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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, P.C.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a rule permitting the government by way of a bill of particulars to add funds paid prior to indictment to retain an attorney to an indictment's criminal forfeiture count is inherently unconstitutional.

2. Whether the Comprehensive Forfeiture Act, 21 U.S.C. § 853 *et seq.*, preempts a state law action for conversion founded upon that statute's relation-back provision.

3. Whether the relation-back fiction codified in 21 U.S.C. § 853(c) creates in the government a sufficient property interest in a forfeited asset to satisfy the elements of a common law claim for conversion against a third-party transferee for value.

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PETITION FOR A WRIT OF CERTIORARI

The law firm of Moffitt, Zwerling & Kemler, P.C. ("MZK") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported as *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996) ("*Moffitt V*"); the opinion is set forth in the Petitioner's Appendix ("Pet. App.") at 1a. The pertinent opinions of the United States District Court for the Eastern District of Virginia are reported as *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D. Va. 1994) ("*Moffitt I*"), and *United States v. Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1190 (E.D. Va. 1995) ("*Moffitt IV*"); these opinions are set forth in the Peti-

tioner's Appendix at, respectively, Pet. App. 124a, and Pet. App. 22a.[1]

JURISDICTION

The Fourth Circuit entered its judgment on May 9, 1996. MZK's petition for rehearing and suggestion for rehearing en banc was denied on June 4, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall be held to answer for a capital, or other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] Related district court opinions in this matter include *In re Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527 (E.D. Va. 1994) (*"Moffitt II"*), Pet. App. 89a; and *In re Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1152 (E.D. Va. 1995) (*"Moffitt III"*), Pet. App. 53a.

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 903 of the Comprehensive Forfeiture Act of 1984, 21 U.S.C. §903 *et seq.*, provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

Section 853 of the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853, is set out in full at Pet. App. 170a.

STATEMENT

This case involves the government's tactical efforts to recover from a reputable criminal defense law firm a bona fide legal fee of $103,800 paid prior to indictment by one of its clients who was a target of a federal grand jury narcotics investigation. Months after the fee was paid, first in an original and then in a superseding indictment, the government sought criminal forfeiture of some but not all of the defendant's assets pursuant to the Comprehensive Forfeiture Act, 21 U.S.C. § 853 *et seq.* ("CFA"). Although the government was aware of the amount, manner, and source of the fee payment at least *two* months *prior* to the return of the superseding indictment, the grand jury did not in either indictment specify the funds used to pay the fee as an asset subject to forfeiture.

Both before and after the return of the superseding indictment, the prosecutors negotiated with the law firm and actively litigated pre-trial motions without ever notifying or suggesting to defense counsel that the government intended to make any fee forfeiture claim. Indeed, shortly before the scheduled trial date, at a hearing on a pretrial motion to quash a government trial subpoena of the law firm's fee records and other related documents, the government represented to the court on the record that the government was *not* seeking, and that the indictment did *not* embrace, attorney-fee forfeiture. After the district court quashed the subpoena, the government, in a tactical decision to improve its position on appeal of the order to quash, filed a bill of particulars adding to the forfeiture count the money used pre-indictment to pay the law firm. It also obtained a restraining order preventing the defendant and the law firm from expending what remained of the fee. Shortly thereafter, due to issues injected into the case by the fee forfeiture claim, the law firm was conflicted out of the case.

By the time the restraining order issued, the law firm had spent in the ordinary course of its business the great bulk of the funds received as its fee. After extensive discovery, the court determined that approximately $27,000 of assets traceable to the fee payment remained in the firm's possession. Those assets were ordered forfeited to the government.

Not satisfied with this remedy, the government commenced in federal court a state law action for conversion against the law firm. Under the CFA, upon forfeiture the government's title to forfeited assets relates back to the time of the act giving rise to the forfeiture—in this case, a point in time prior to when the firm received the fee payment. The government therefore claimed that the firm's expenditure of assets to which it retroactively held title under the forfeiture order constituted a tort and that the government was entitled to damages equal to $103,800, the full value of the fee payment, plus pre-judgment interest. Under the CFA, however, the "lost value" of for-

feited property that is expended, transferred, or consumed prior to the forfeiture order may only be recovered in the form of substitute assets to be seized from criminal defendants, but not from third parties. Thus, although unable under the CFA to recover the full value of the fee payment, the government sought an equivalent result by resort to a common law action drawing upon the CFA's relation-back provision.

This case squarely poses the important federal question whether the government can use a post-indictment bill of particulars to add an attorney's fee, paid prior to indictment, to a criminal forfeiture count when the grand jury has failed in the indictment to specify the funds used to pay the fee as a forfeitable asset of the defendant. Both the district court and the Court of Appeals held that the bill of particulars was a constitutionally adequate substitute for the probable cause scrutiny of the grand jury even when the asset at issue had been used to retain counsel.

This decision of the Fourth Circuit conflicts with reasoning underlying this Court's decisions in *United States v. Monstanto*, 491 U.S. 600, 109 S. Ct. 2657 (1989), and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646 (1989), and is inconsistent with decisions of the Second, Third, Seventh, Eighth, and Ninth Circuits.[2] Indeed, the procedure sanctioned here for federal criminal forfeiture proceedings appears to be the very type of "rule that is inherently unconstitutional" proscribed by this Court in *Caplin*, 491 U.S. at 634, 109 S. Ct. at 2657.

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[2] *See United States v. Michelle's Lounge*, 39 F.3d 684, 691, 695 (7th Cir. 1994) (due process requires adversary hearing on probable cause for forfeiture if the government has seized assets needed to retain counsel); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382 (1991) (same); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (same); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.) (same), *cert. denied*, 474 U.S. 994, 106 S. Ct. 406 (1985); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir. 1981) (same).

This federal question is important because the rule endorsed here by the Fourth Circuit deprives a criminal defendant, without any process whatsoever, of the right to retain counsel using property not yet adjudged forfeitable or even claimed to be forfeitable; removes the neutral check of a grand jury or court finding of probable cause; and seriously tilts the adversarial balance between prosecution and defense by allowing the government to introduce without any neutral check a disqualifying conflict between the criminal defendant and his counsel at any time. In a "mixed-asset" case such as this one, where the indictment does not seek all a defendant's assets, and, indeed, does not seek other assets transferred for adequate consideration prior to indictment, the Fourth Circuit's rule devastates an otherwise valid, lawful attorney-client relationship.

The second and third important federal questions presented in this petition arise from the government's attempt to use a common law conversion action to circumvent the statutory constraints imposed by the CFA. Without the benefit of the CFA's relation-back provision, the government could not establish the two elements of conversion under Virginia law—1) the government's immediate right to possess the fee at the time it was paid to the firm, and 2) the law firm's wrongful exercise of dominion over that fee. *See United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902, 905 (1994). Before the forfeiture order was entered, it is undisputed that the criminal defendant owned the money he used to pay the fee and that the firm in turn was authorized to expend the money it received. Thus, the government may state a claim for conversion only if the operation of the relation-back fiction, by retroactively vesting title in the government at a point prior to the time when the law firm was paid, transforms that lawful receipt of payment into a wrongful interference with the government's then immediate right to possess that money.

The CFA, however, does not allow the government to recover substitute assets in the form of monetary damages

from third-party transferees. The district court therefore rejected on preemption grounds the government's conversion claim, holding that the government could not avoid the CFA's express limitation on the substitute asset remedy by seeking equivalent results by means of a tort action itself dependent on the CFA. The Fourth Circuit reversed, holding that the statutory limits upon the government's power to forfeit substitute assets do not preempt state law actions—even those predicated solely upon the relation-back provision of the applicable forfeiture statute—that achieve recovery of substitute assets from third parties.

The resolution of the preemption question is important to establish the reach of the government's forfeiture power. The government conceded below that the CFA does not authorize the pursuit of substitute assets from a third-party transferee for value such as the law firm. Nonetheless, the Fourth Circuit's rule allows the government to selectively incorporate one part of the CFA into a state law action—"cherry-picking" the relation-back provision—to expand its powers to achieve that very goal. The Fourth Circuit's reasoning in this respect is inconsistent with the preemption analysis set out by this Court in *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270 (1990) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), and relies in part upon an interpretation of 21 U.S.C. § 903 that is at odds with the interpretation of that statutory provision by the Third, Fifth, and Eleventh Circuits.[a]

The final, and related, question of federal law is whether the relation-back fiction codified in § 853(c) of the CFA creates in the government a sufficient property interest in the forfeited asset to satisfy the two elements of a common law claim for conversion. The Fourth Cir-

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[a] *See United States v. Stazola*, 893 F.2d 34, 38 (3d Cir. 1990); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1218 (5th Cir. 1991); *United States v. Lot 5*, 23 F.3d 359, 363 & n.8 (11th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 722 (1995).

cuit was untroubled by its counterintuitive conclusions that 1) the firm's then lawful expenditure of the fee was somehow transformed, after the fact, into a tort; and 2) a retroactive right to title also embraced a retroactive immediate right to possession. This decision conflicts with this Court's prior interpretations of the common law and statutory relation-back fictions in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 113 S. Ct. 1126 (1993) ("*Buena Vista*"), and in *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), and is inconsistent with the reasoning adopted by the Ninth Circuit in *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 115 S. Ct. 63 (1994).

As this Court has recognized, criminal forfeiture can be a "devastating" weapon. *See Caplin*, 491 U.S. at 634, 109 S. Ct. at 2657. Congress therefore placed strict constraints upon the scope of the government's forfeiture authority with respect to third parties who have committed no crime. Perhaps the most significant such protection, codified at 21 U.S.C. § 853(p), is the express limitation upon the government's ability to seek substitute assets, including monetary damages, to replace the "lost value" of forfeitable assets that have been consumed or transferred by the defendant: the statute authorizes the government to seek such "replacement value" *solely* from criminal defendants. The government's conversion action plainly attempts to go further than the CFA permits so as to recover substitute assets from third-party transferees for value and criminal defendants alike. This attempted aggrandizement of the government's ability to pursue forfeitable assets threatens the settled property expectations of countless third-party transferees for value, who now potentially face retroactive tort liability for the lawful (at the time) receipt and use of assets later ordered forfeited.

BACKGROUND

Moffitt, Zwerling & Kemler, P.C. ("MZK") is a well-known and reputable criminal defense firm located in Alexandria, Virginia. In late August 1991, William Paul

Covington met with two MZK partners and retained the firm to represent him with regard to an ongoing investigation by federal prosecutors into illegal drug activity. Covington, a target of the grand jury investigation, owned and ran two legitimate businesses: an auto repair service and a towing service. Covington and MZK agreed on a $100,000 fee, which he paid in cash on August 22 and 23, 1991. An additional $3,800 was held by the firm for costs and disbursements. MZK then timely filed an IRS Form 8300 report reflecting the two cash payments but, upon Covington's request, did not disclose his identity on the IRS form.

A multi-count indictment was returned on October 30, 1991, naming Covington and eight co-defendants. The indictment included a forfeiture count identifying twelve categories of assets as potentially forfeitable under 21 U.S.C. § 853. The cash used to pay MZK's fee was not identified in the indictment, although other specific items of cash were included; nor did the forfeiture count seek all of Covington's assets. The indictment did contain a general boilerplate "catchall" clause seeking forfeiture of all properties constituting proceeds of the illegal drug activity or used to facilitate the drug offenses. In November 1991, from two separate witnesses (in addition to the filed Form 8300), the government learned of the facts and circumstances surrounding the cash fee paid by Covington to MZK.[4] *See* Pet. App. 205a-06a. The grand jury returned a superseding indictment on January 9, 1992. The superseding indictment contained a forfeiture count identical to that in the original indictment. The cash used to pay MZK's fee was again not specified.

On February 11, 1992, the government served on MZK a trial subpoena duces tecum for the law firm's fee records relating to its representation of Covington. On

[4] In December 1991, the law firm filed numerous pre-trial motions on behalf of Covington, including a motion for a bill of particulars. The government successfully opposed that motion on the ground that the indictment was "drawn . . . sufficiently specific and complete." Pet. App. 184a.

March 13, 1992, the district court quashed the subpoena and rejected the government's argument that the fee information constituted evidence of "unexplained cash" assets that was admissible at trial to establish Covington's illegal drug activities.[5] The court had specifically questioned the government on the record concerning the timing of its actions and the relevance of the fee to the indictment. The prosecutor responded (i) that the fee was *not* the subject of any count in the indictment; and (ii) that the government was *not* seeking criminal forfeiture of the fee. *See* Pet. App. 185a-87a.

In a tactical move to strengthen its position on appeal of the trial court's order quashing the trial subpoena for the law firm's fee records, the prosecutors on March 16, 1992, wrote the Department of Justice Asset Forfeiture Office seeking approval of fee forfeiture. The prosecutors expressly stated they were seeking fee-forfeiture approval to bolster the government's position on appeal of the order quashing the subpoena:

> [If this request is approved,] the United States will seek reconsideration of [Judge Bryan's] ruling in light of the forfeiture of the fees themselves as reflected in the Bill of Particulars [we will file]. Alternatively, the United States will seek an interlocutory appeal to the Fourth Circuit Court of Appeals of the court's granting the motion to quash. In that context the decision to forfeit the fees will similarly provide a consistent position for the United States.

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[5] On February 11, 1992, the government served on the law firm a letter threatening felony tax prosecution of the firm, its principals, and Covington for having withheld client-identifying information from the Form 8300 filed five months earlier. District Judge Bryan urged the government to voluntarily withdraw its threatening letter (which it did) because: "regardless of actual motives, the perception that arises from the timing of it is damning it seems to me, to the United States Attorney's Office. The idea that you threaten a lawyer with prosecution a few weeks before trial in which he is involved, it looks like, whatever you meant, that you are trying to drive that lawyer out of the case." Pet. App. 208a.

Pet. App. 210a. The government received approval to seek fee forfeiture and on May 12, 1992, filed a bill of particulars seeking criminal forfeiture of the $103,800 paid to MZK. The next day the district court entered a qualified restraining order, which extended only to such portion of the original $103,800 as remained segregated and preserved at that late date—roughly $3,700. The remainder had been expended by MZK either to pay the costs of Covington's representation or had been earned by MZK as compensation for that representation and spent in the ordinary course of the law firm's business.

In August 1992, as a result of issues arising from injection of the fee issue into the case, the district court disqualified MZK from the case. New counsel was then appointed and Covington subsequently pleaded guilty and consented to the forfeiture of those of his assets identified by the superseding indictment and the bill of particulars. On March 1, 1993, the district court entered a supplemental consent order forfeiting the $103,800 paid by Covington to MZK.

On April 12, 1993, MZK filed a petition pursuant to 21 U.S.C. § 853(n) seeking to modify the forfeiture order so as to establish its interest in the fee. MZK also argued that the forfeiture proceeding was procedurally flawed because, *inter alia*, the fee had not been specified in either indictment but had instead been added to the case by way of the bill of particulars. After a two-day hearing in July 1993, the district court issued an opinion rejecting both the firm's petition and its challenge to the procedure used to inject fee forfeiture into the criminal case. *See Moffitt I*, Pet. App. 124a.

On February 28, 1994, the government moved the district court to issue an order directing the law firm to remit the full $103,800 fee paid by Covington. The district court rejected this request, holding that the government could recover from MZK only such assets as were "traceable" to the forfeited fee because § 853(p) authorized the government to recover the lost value of consumed

forfeited property only by seeking substitute assets from criminal defendants. *See Moffitt II*, Pet. App. 119a-123a. The government did not appeal this decision. Discovery then began to identify those assets in MZK's possession that were "traceable" to the forfeited fee. *See Moffitt III*, Pet. App. 53a. On February 17, 1995, the district court issued a final order directing forfeiture of approximately $27,000 that it found to be "traceable" to the original fee. MZK did not appeal this order.

On October 21, 1994, while statutory forfeiture proceedings against MZK were ongoing, the government brought in the district court a Virginia common law action for conversion and detinue seeking damages for MZK's allegedly wrongful possession and disposition of the forfeited fee. The district court held that the CFA preempted such actions within the criminal forfeiture context. *See Moffitt IV*, Pet. App. 22a.

The government appealed to the Fourth Circuit, *inter alia*, the district court's decision in *Moffitt IV* holding the government's common law conversion action to be preempted. MZK cross-appealed the district court's decision in *Moffitt I* rejecting its § 853(n) petition and upholding the belated use of the bill of particulars. These actions were consolidated for purposes of appeal.

The Fourth Circuit reversed in part and affirmed in part. *First*, although it recognized that the forfeiture count of the indictment did not specify the funds used to pay the fee, the court held that a "catchall" clause and a reference to cash "not yet accounted for" sufficed to identify the fee asset as potentially subject to forfeiture. *Moffitt V*, Pet. App. 5a-7a. *Second*, drawing primarily upon this Court's opinion in *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), the court rejected the district court's preemption holding and found no reason to conclude that the passage of the CFA was intended to abridge the government's "long-standing" right to bring a conversion action. *Moffitt V*, Pet. App. 11a-16a. Disregarding contrary precedent from the Third,

Fifth, and Eleventh Circuits, the Fourth Circuit reinforced its conclusion by reference to 21 U.S.C. § 903. *Id.* at 17a. *Third*, the court held that the relation-back fiction retroactively created an immediate right to possession arising prior to the time the fee was paid so that the government could state the elements of a common law conversion claim. *Id.* at 17a-18a.

By order dated August 9, 1996, the district court granted summary judgment in favor of the government on its claim for conversion.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction over the forfeiture action was pursuant to 18 U.S.C. § 3231 and 21 U.S.C. § 853(l) and over the conversion action was pursuant to 28 U.S.C. § 1345.

REASONS FOR GRANTING THE PETITION

I. APPROVING THE GOVERNMENT'S TACTICAL USE OF A BILL OF PARTICULARS TO ADD FORFEITURE OF AN ATTORNEY'S FEE TO A PENDING CRIMINAL CASE CONSTITUTES AN "INHERENTLY UNCONSTITUTIONAL RULE."

The rule approved by the Fourth Circuit permitting the government unilaterally by way of bill of particulars to inject attorney fee forfeiture into criminal cases at the post-indictment/pre-trial stage is an "inherently unconsitutional rule" that undermines the adversary process protected by the Fifth and Sixth Amendments. The government's position below was that § 853 entitles it to forfeit assets used to retain counsel even if the specific items to be forfeited are not approved for forfeiture by a grand jury and included in the forfeiture count in the indictment and thus are not subjected to probable cause scrutiny. There is no dispute that the forfeiture counts at issue in this case did not specifically identify the fee paid to MZK as subject to forfeiture. Indeed, the government acknowledged to the district court that the fee was not included in the forfeiture count, *see supra* p. 10, and the Fourth Circuit recognized that "the government first

specifically identified the $103,800 fee as subject to forfeiture in a bill of particulars filed after the superseding indictment." *Moffitt V*, Pet. App. 6a-7a. Despite this, the Fourth Circuit concluded that it was constitutionally permissible for the government unilaterally to add the fee asset to the forfeiture count long after the indictment and restrain the fee asset prior to trial because the government had included a boilerplate "catchall" provision in the forfeiture count. *Id.*

But this was a "mixed assets" case. The defendant operated two legitimate businesses, from one of which he derived substantial income. The boilerplate "catchall" clause in the forfeiture count did not seek to forfeit all of Covington's assets (as did the forfeiture count in *Caplin*), but instead sought solely forfeiture of illegal proceeds or their derivatives, and of any assets used to commit or facilitate the alleged offenses.

The Fourth Circuit's rule allows prosecutors, even in "mixed assets" cases, to forfeit fees paid to attorneys prior to indictment or restraining order; to restrain such fees before the defendant is actually tried; to do so without any prior warning to the counsel who have been and are actively engaged in expending substantial time and resources in contesting the government's charges and providing a defense; and all without any independent check on the prosecutor's power by judge or grand jury. Under this rule, any indictment containing a general forfeiture count can be unilaterally manipulated by the prosecution's belated use of a bill of particulars so as to achieve the desired tactical objective of driving selected defense counsel out of the case. This rule therefore undermines the adversary process protected by the Fifth and Sixth Amendments in the following ways:

First, the rule gives the government improper "veto" power over who its adversaries will be. To target a fee for forfeiture after the return of the indictment will almost inevitably result (as it did here) in disqualification of defense counsel on conflict grounds. If the government can file a bill of particulars without the grand jury's prob-

able cause scrutiny, and without an independent probable cause finding by the court, the prosecutor can control whether and when a disqualifying conflict is injected into the criminal case, and can thereby effectively determine who will (not) represent a defendant.

Second, the rule permits the government to use forfeiture as a tactical weapon in the criminal contest—a use that is plainly improper. *See United States v. Nichols*, 841 F.2d 1485, 1508 (10th Cir. 1988) (tactical use of forfeiture "would undermine the balance necessary to the adversary system"). The facts of this case illustrate the harm to the adversary process that is caused by tactical use of the forfeiture power. It is undisputed that:

> (i) the government had information regarding details of MZK's fee as early as November 1991 (Pet. App. 205a-06a);
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> (ii) it continued to litigate pre-trial motions and plea bargain with MZK for several months without providing any notice to Covington or MZK that it believed the fee was subject to forfeiture;
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> (iii) it failed to investigate the tainted fee allegation through the grand jury that returned the superseding indictment in January 1992;
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> (iv) only after MZK rejected the government's final plea offer, and noticed its intent to rely on an insanity defense, did the government—on the eve of the scheduled trial date—first raise the fee issue with a trial subpoena for fee records;
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> (v) at the hearing on the law firm's motion to quash the subpoena, the prosecutor stated, in response to Judge Bryan's questions, that the monies paid the law firm were not a subject of any count in the indictment, and that the government was not pursuing fee forfeiture (Pet. App. 185a-87a);
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> (vi) after Judge Bryan quashed the trial subpoena, the prosecutors made a tactical decision to seek approval from the Department of Justice for fee forfeiture to improve the government's chance of prevailing on its appeal of Judge Bryan's ruling (Pet. App. 210a);

(vii) after securing approval, the government unilaterally by filing a bill of particulars added MZK's fee to the indictment without a grand jury or a trial court finding of probable cause to believe the funds used to pay the fee were connected to the crimes charged in the criminal case; and

(viii) these governmental actions (which the district court noted "reasonable people" could view as an attempt "to drive the law firm out of the case" (Pet. App. 211a)) ultimately resulted in the MZK firm's disqualification from its representation of Covington.

Third, the rule undermines the statutory provisions that expressly protect a third-party transferee's right to prior notice of forfeiture. *See, e.g.*, 21 U.S.C. § 853(e)(1)(B) (requiring notice to third parties before a court may enter a pre-indictment protective order); *see also* 21 U.S.C. § 853(e)(1)(A). Lack of notice is especially prejudicial in a case such as this where the government allowed the third party to render substantial services to the defendant in exchange for that asset despite its belief that the asset might in fact be forfeitable.[6]

This rule unfairly allows prosecutors to turn criminal forfeiture, a weapon designed by Congress to serve solely as additional *in personam* punishment against convicted criminal defendants, into a proceeding that punishes innocent criminal defense attorneys who have rendered substantial legal services and thus have paid good value for the forfeited fee.[7] Such an inherently unconstitutional rule

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[6] The legislative history indicates that Congress agreed with the requirements in Fed. R. Civ. P. 7(c)(2) and 31(e) that forfeiture claims be specifically identified in the indictment and that the jury render a special verdict. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 193-94 & n.15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3376-77 & n.15 (*"Senate Report"*); *see also United States v. Pelullo*, 14 F.3d 881, 904 (3d Cir. 1994).

[7] Indeed, as part of Covington's plea bargain, the government offered to recommend a sentence reduction in exchange for his "unstinting efforts" to aid it in its forfeiture efforts against his counsel. *See In re Phillips, Beckwith & Hall*, 896 F. Supp. 553 (E.D. Va. 1995) (describing plea agreement in exchange for

is at odds with the reasoning underlying this Court's decisions in *Caplin* and *Monsanto* and violates the Fifth and Sixth Amendment rights of criminal defendants and the Fifth Amendment rights of defense attorneys and other third-party transferees for value.[8] It is inconsistent as well with decisions by the Second, Third, Seventh, Eighth, and Ninth Circuits. *See supra* n.2.

A. This Court's Seminal Attorney Fee Forfeiture Cases—*Caplin* and *Monsanto*—Presume the Government Will Specify the Fee Asset in the Indictment for Probable Cause Scrutiny by the Grand Jury.

This Court held in *Caplin* and *Monsanto* that "neither the Fifth nor Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees." *See, e.g., Monsanto*, 491 U.S. at 614, 109 S. Ct. at 2666. The Court recognized, however, that "freezing the assets in question before [a criminal defendant] is convicted—and before they are finally adjudged to be forfeitable—raises distinct constitutional concerns." 491 U.S. at 615, 109 S. Ct. at 2666. And in *Caplin* this Court warned that attorney fee forfeiture could be unconstitutional in "specific cases of prosecutorial misconduct . . . or when [a challenge is] directed to a rule that is inherently unconstitutional." 491 U.S. at 634, 109 S. Ct. at 2657.

The CFA provides that, based upon the indictment, the government can obtain a restraining order preventing the

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Covington's cooperation as chief witness against his counsel). Moreover, while the government has zealously pursued forfeiture from MZK, it has agreed to return some assets to Covington notwithstanding its power under § 853(p) to seek substitute assets from Covington. *See Moffitt III*, Pet. App. 64a-65a.

[8] *United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir. 1990), and *United States v. Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir. 1980), offer no support for the conclusion that a bill of particulars can be used to add assets to an indictment without probable cause review. Those cases merely hold that a bill of particulars can be used to "pinpoint" assets already identified or embraced by an indictment.

defendant from using assets named in the forfeiture count to pay counsel. *See* 21 U.S.C. § 853(e)(1)(A). Such pre-trial removal of the presumptively-innocent defendant's control over his assets clearly is a deprivation of property. *See United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (en banc), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382 (1991). That deprivation is of even greater concern where the defendant is prevented prior to trial from using his assets to retain counsel to defend himself from the very allegations which provide the basis for the restraining order. *Id.* at 1193. Such deprivation is constitutional, therefore, only where the fee asset has been specified in the indictment and thereby subjected to at least the minimal, neutral check of the grand jury's probable cause scrutiny. *See Monsanto*, 491 U.S. at 615, 616, 109 S. Ct. at 2667.

This Court's statement in *Caplin* that "any assets which the Government wishes to have forfeited must be *specified* in the indictment," *Caplin*, 491 U.S. at 632 n.10, 109 S. Ct. at 2656 n.10 (emphasis added), is not a throw away, as the Fourth Circuit's rule would make it, but a constitutional necessity. By allowing the government to rely on a nonspecific "catchall," the Fourth Circuit removed the only neutral check preventing a presumptively-innocent defendant from being deprived without due process of his property and his right to use his property to retain counsel of his choice.

B. The "Catchall" Provision Relied On By the Fourth Circuit Allows the Government to Avoid Neutral Probable Cause Scrutiny of the Fee Assets and Conflicts with Decisions of Other Circuits.

The catchall included in the forfeiture count identified as forfeitable:

> all properties constituting, or derived from proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy and any properties used, or intended to be used by the defendants in any manner or part, to commit, or to facilitate the commission of such violation.

Pet. App. 182a. The district court correctly described it as "a general allegation [that] doesn't focus on any specific fund, and certainly not on legal fees." Pet. App. 192a. At most the provision "sought forfeiture of all the proceeds of Covington's criminal activity." *Moffitt V*, Pet. App. 5a-6a. It did not require the grand jury to determine that there was probable cause to believe any *particular* asset was subject to forfeiture, nor did it require the grand jury to determine there was probable cause to believe that *all* the defendant's assets were forfeitable. In contrast, the provision used in the *Caplin* indictment required the grand jury to find probable cause that *all* of the defendant's assets were tainted. *See* Pet. App. 201a.

This boilerplate provision provides no meaningful protection against the deprivation of important constitutional protections at the most critical stages of a criminal prosecution. At best it is a meaningless truism, requiring only a finding that all assets that are forfeitable are subject to forfeiture. *See United States v. Amend*, 791 F.2d 1120, 1128-29 (4th Cir.) (criticizing special forfeiture verdict form for employing similarly "tautologous" language), *cert. denied*, 479 U.S. 930, 107 S. Ct. 399 (1986). To allow the government to rely on this boilerplate catchall is to allow the government to bypass altogether any check on its ability to prevent a presumptively-innocent defendant's use of his property to retain counsel of his choice. A specific probable cause finding by the grand jury is scant enough protection from the deprivation of fundamental constitutional rights; reliance on such an imprecise catchall provision is no protection at all.[9]

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[9] The Fourth Circuit pointed out that the forfeiture count identifies $168,000 in cash as subject to forfeiture. *See Moffitt V*, Pet. App. 6a. But there is no dispute that the $168,000 in cash refers to specific cash other than that paid to MZK. The $168,000 was made up of other assets, specifically money spent by Covington on alimony, entertainment, jewelry, and cars. *See* Pet. App. 189a-90a. The government presented evidence of the $168,000 to the grand jury in October 1991, but did not receive details of the fee payment until November 1991. Indeed, the government represented to the district court in March 1992 that the fee was *not* the subject of

The Fourth Circuit's reliance on the catchall provision stands in stark contrast to the procedural protections required by other Courts of Appeals where the government seeks to forfeit assets to be used to retain counsel. Because the only source of certainty that the fee asset is probably the proceeds of criminal activity is the indictment itself, and the indictment emerges from a nonadversarial process, the Second Circuit, sitting *en banc*, has held that a criminal defendant has a legitimate interest in ensuring that probable cause is adequately established at a pretrial hearing before he is effectively deprived of counsel of choice as a result of a pre-trial restraint of his assets. *Monsanto*, 924 F.2d at 1195. That court ruled, therefore, that the Fifth and Sixth Amendments require an adversary pre-trial hearing as to probable cause that the defendant committed the crimes that provide the basis for forfeiture and that the properties specified as forfeitable in the indictment are properly forfeitable. *Id.* at 1203. Importantly, at such a hearing the grand jury's probable cause determination as to the forfeitability of the specified assets may be reconsidered by the court. *Id.* The Third, Seventh, Eighth, and Ninth Circuits have reached the same conclusion. *See supra* n.2. Thus, in at least five circuits a criminal defendant is entitled to a pre-trial adversarial hearing at which the grand jury's *ex parte* finding that there is probable cause to believe the fee asset is subject to forfeiture can be reconsidered. In the Fourth Circuit, however, the government need not present the fee asset to the grand jury at all.

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any count in the indictment (Pet. App. 185a); and that it was *not* seeking criminal forfeiture of the fee (Pet. App. 186a). Moreover, the fee asset is described in the bill of particulars as an *additional* asset to be *added* to the forfeiture count. The bill of particulars adds the fee asset as item "number 13" to the twelve item list of forfeitable assets that still contained the $168,000 as item "number 5." *Compare* Pet. App. 183a *with* 191a.

II. THE PROPER INTERPRETATION OF THE PREEMPTIVE EFFECT OF SECTION 853 IS A QUESTION OF SUBSTANTIAL IMPORTANCE.

The CFA dramatically expanded the efficacy of criminal forfeiture by incorporating for the first time in this nation's history the relation-back fiction traditionally used in civil forfeiture into the statutory criminal forfeiture framework so as to forestall criminal defendants from shielding assets by simply transferring them. *See* 21 U.S.C. § 853(c); *Senate Report*, 1984 U.S.C.C.A.N. at 3374-81, 3383-84, 3394. Congress simultaneously acted to further limit the extent to which criminal defendants could obstruct the recovery of forfeitable property by authorizing the government to obtain the full value of forfeited property through the seizure of substitute assets where the original forfeited property is beyond the reach of the statutory scheme. *See* 21 U.S.C. § 853(p); *Senate Report*, 1984 U.S.C.C.A.N. at 3384-85, 3395. Significantly however, Congress did not grant the government license to pursue substitute assets from any third party who might have possessed forfeitable property. The express terms of § 853(p) allow the government to seek substitute assets only from criminal defendants. Indeed, the Senate Report indicates Congress anticipated that § 853(p) would be used in conjunction with § 853(c) to mitigate the effect of forfeiture upon third-party transferees. *See Senate Report*, 1984 U.S.C.C.A.N. 3182, 3384 & nn. 29, 30.

The question raised by this case is whether the government may nonetheless pursue substitute assets (here, monetary damages) from innocent third-party transferees by means of a state law conversion action that itself incorporates the federal statutory relation-back provision. The government here quite candidly conceded before the district court that it brought this conversion action against MZK in an effort to circumvent the express limitation of § 853(p) to criminal defendants. *See Moffitt IV*, Pet. App. 46a. The government chafed at this constraint in the forfeiture statute and consciously sought to act in derogation of its statutory powers to achieve through

the common law a result not authorized by Congress—the extraction from MZK of substitute assets in the form of monetary damages equal to the full $103,800 forfeited from Covington.

The government chose well in its bid to evade the CFA's limits upon its statutory forfeiture powers. Common law conversion offers few defenses: lack of knowledge, intent, or motive does not defeat the claim if a defendant has exercised dominion over property to which plaintiff held an immediate right of possession. 18 Am. Jur. 2d Conversion § 3, at 147-48 (1985); *see also Universal C.I.T. Credit Corp. v. Kaplan,* 198 Va. 67, 76, 92 S.E.2d 359, 365 (1956) (good faith is not a defense to conversion). Potential liability in conversion, moreover, does not end with an initial transferee, but cascades down the chain of title to reach any individual—even a bona fide purchaser for value—who holds or has transferred the plaintiff's property.

The government, of course, could not state a *pure* common law conversion claim. It plainly did not have an immediate right to possess the forfeited fee prior to the entry of the order of forfeiture. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 127, 113 S. Ct. 1126, 1136 (1993) ("Until the Government [wins a judgment of forfeiture], someone else owns the property."). It is only by selectively "cherry-picking" the relation-back fiction from the statutory criminal forfeiture scheme—ignoring the accompanying protections against and limitations upon such forfeiture—that the government can even hope to state a claim for conversion.

The resulting hybrid cause of action—common law conversion plus statutory relation-back minus statutory defenses and limitations—radically expands the range of assets potentially susceptible to government forfeiture. Through the operation of the relation-back fiction, state law conversion could now impose liability against any third party who has possessed or transferred any identifi-

able asset covered by a forfeiture order.[10] Unlike the statutory scheme, third-party transferees like MZK would be liable in conversion for the full value of forfeitable assets partially expended or consumed in the ordinary course of business. Unlike the statutory scheme, the government could seek damages from innocent third-party transferees who have transferred assets prior to the initiation of forfeiture proceedings and who therefore have no incentive, and potentially no ability, to file a § 853(n) petition. Unlike the statutory scheme, the government could bring a conversion action to recover lost rents for use of an asset in addition to obtaining the asset itself through forfeiture.

No evidence exists to support the conclusion that Congress intended the government to wield such supra-statutory powers. Neither the CFA itself nor the legislative history found in the Senate Report speaks to this question. In passing the CFA, Congress did not legislate against a common law backdrop where forfeitable assets were pursued through conversion. Research by counsel has revealed not one case since *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806) (Marshall, C.J.), in which the government has attempted to bring a conversion action to further its pursuit of forfeitable property. In *Grundy*, as discussed in more detail at Part III *infra*, Chief Justice Marshall rejected the attempt as inconsistent with the relation-back fiction. No state law conversion action could in any event have been brought as an adjunct to a criminal forfeiture prior to the incorporation of the federal relation-back fiction into the criminal forfeiture framework. Thus, the question is whether the CFA inadvertently imbued the government with a reach far longer than is authorized by its own provisions, or whether, instead, the CFA preempts state

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[10] Indeed, if the government forfeits a car, and that car was wrecked by a third-party transferee before the forfeiture order was entered, the Fourth Circuit's decision allows the government to sue that third party for damages.

law in this context so as to restrain the government from overreaching its statutory limits.

The district court, applying the preemption standards set out in *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 2275 (1990), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621 (1984), concluded that the conflict between the statutory framework and the results achievable by way of a conversion action was too great to allow a hybrid action because the government's use of state law " 'stands as an obstacle to the accomplishment of the full purposes and objectives' of Congress's carefully crafted forfeiture scheme." *Moffitt IV*, Pet. App. 44a-46a (citations omitted). The Fourth Circuit disagreed. Drawing upon this Court's holding in *United States v. Texas*, 507 U.S. 529, 113 S. Ct. 1631 (1993), and looking exclusively to the nominal cause of action pleaded by the government, the Fourth Circuit framed its preemption analysis as an affirmation of the government's "long-standing" right to bring an action in conversion. Starting from the familiar principles that "federal statutes do not, by implication, abrogate the government's right to bring common law suits," *see Moffitt V*, Pet. App. 11a, and that Congress is assumed to act without an intent to supplant state law, *see id.* at 14a, the Fourth Circuit reasoned that the absence from § 853 of any mention of a state law conversion action undercut any inference of preemption that might arise from the express limitation of § 853(p).

The Fourth Circuit supported its conclusion by reference to 21 U.S.C. § 903, which disavows a congressional intent to preempt state drug laws in the absence of a positive conflict between state and federal law. *See Moffitt V*, Pet. App. 17a. This broad interpretation of § 903, however, creates a conflict with the precedents of the Third, Fifth, and Eleventh Circuits, which hold § 903 to be "directed only to state laws controlling drug abuse and enforcement," *Stazola*, 893 F.2d at 38—a category of actions that certainly does not embrace a common law action for conversion. *See supra* n.3.

Texas, in any event, is inapposite to this case. The Debt Collection Act analyzed in *Texas* imposed upon individuals, but not states, a liability for prejudgment interest that was more onerous than the common law. *See* 507 U.S. at 536, 113 S. Ct. at 1635. This Court concluded, reasonably enough, that in so strengthening the government's rights against individuals—the expressly identified target of the legislation—Congress had not intended *sub silentio* to preempt and thereby *weaken* governmental rights against those not expressly affected by the act but had instead left the states to the more lenient common law regime. The CFA similarly strengthened the government's rights of forfeiture. In contrast to the facts of *Texas*, however, preemption by the CFA would not weaken any preexisting common law right of the government to conversion because *the government possessed no such right in this context*. The necessary hybrid action is created, if at all, only as an unforeseen byproduct of the CFA's relation-back provision. It is in fact the rejection of preemption that wreaks *sub silentio* changes in the common law by extending the reach of conversion to encompass transferred forfeited assets—thereby subjecting MZK to a post-CFA common law action that is more onerous than the statutory scheme or the pre-CFA common law. The relevant inquiry therefore is whether Congress, in strengthening the efficacy of criminal forfeiture through incorporation of the relation-back fiction, inadvertently *and simultaneously* empowered the government to use a heretofore unavailable state law tort claim to evade the statutory limits placed upon that newly strengthened forfeiture authority.

III. BASING A COMMON LAW TORT CLAIM ON THE RELATION-BACK FICTION CONFLICTS WITH THIS COURT'S PRECEDENT.

The Fourth Circuit held that the *in rem* relation-back doctrine could establish the elements of an *in personam* state law conversion action. This decision directly conflicts both with this Court's interpretation of an analogous forfeiture statute in *United States v. Grundy and Thorn-*

burgh, 7 U.S. (3 Cranch) 337 (1806), and with the interpretation of the common law relation-back fiction adopted by this Court in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 113 S. Ct. 1126 (1993) ("*Buena Vista*"), and by the Ninth Circuit in *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 115 S. Ct. 63 (1994). Indeed, the fundamental incompatibility between the *in rem* relation-back fiction and the *in personam* liability of tort is such that the government has apparently not attempted to pursue a conversion action as an adjunct to forfeiture since the *Grundy* decision 190 years ago. The Fourth Circuit's interpretation of the statutory relation-back provision therefore upsets nearly two centuries of unchallenged precedent.

The Fourth Circuit's decision provides a breathtaking new weapon for the government's forfeiture arsenal. To sanction this sweeping new grant of power the Fourth Circuit conflated two distinct concepts—title and right to possession. It is fundamental that conversion "is concerned with possession, *not title*." 18 Am. Jur. 2d, Conversion § 75, at 198 (emphasis added); *see also id.* § 28, at 161. Yet, the Fourth Circuit concluded that the federal retroactive vesting of title through the relation-back provision of the forfeiture statute also creates a concomitant state retroactive right of immediate possession. The Fourth Circuit cited no cases supporting its theory that a cause of action for conversion can arise retroactively and ignored cases rejecting it. *See, e.g., CHoPP*, 5 F.3d at 1349 (retroactive vesting of interest pursuant to constructive trust theory held not to support subsequent conversion action). Indeed, the court offered no explanation as to how the fiction of relation-back can retroactively create an "immediate" right.

The right to possession is alien to the relation-back fiction's purpose of transferring full ownership to the government at the time the forfeiture order is entered. The Fourth Circuit's holding, however, treats the retroactive vesting provision of 21 U.S.C. § 853(c) as if it were a

self-executing vesting provision. The Fourth Circuit thus relied on a theory that has been expressly rejected by this Court in *Buena Vista*. *See* 507 U.S. at 131, 113 S. Ct. at 1138 (Scalia, J. concurring) (rejecting the "fundamental misconception that, under the common-law relation-back doctrine, all rights and legal title to the property pass to the United States 'at the moment of illegal use' "). In doing so, the Fourth Circuit held that a forfeiture order not only can retroactively divest a third party of title, but also—years after the fact—turn an act of possession, innocent when done, *nunc pro tunc* into a wrongful act resulting in tort damages. This Court in *Buena Vista*, however, held that "[u]ntil the Government [wins a judgment of forfeiture], someone else owns the property. . . . [and] may therefore invoke any defense available to the owner of the property before the forfeiture is decreed." 507 U.S. at 127, 113 S. Ct. at 1136. Surely one defense to a claim of conversion is to assert one's own ownership and concomitant right to possession of the property in question during the period of the alleged conversion.[11]

Even more fundamentally, the *in rem* relation-back fiction cannot be the basis for *in personam* tort liability. Relation-back evolved from the ancient fiction underpinning the English common law of forfeiture—that forfeitable property had itself committed a wrong that rendered it subject to the punishment of the crown. This wrong, whether in the origin of the property, or in its character, or in the use to which it was put, "tainted" not the property's owner *but the property itself*, symbolically imbued by the law with the attributes of humanity. Thus, subsequent transfers of ownership could not cure this symbolic "taint" upon the property, nor could such transfers defeat the government's corresponding right to "punish" the property through forfeiture. Just as the commission of a

[11] *Compare Counihan v. Allstate Ins. Co.*, 25 F.3d 109 (2d Cir. 1994) (holding that the forfeiture of a house cannot retroactively divest the homeowner of the right to collect insurance on that house because "not every right of the owner is lost by virtue of the relation-back of title").

crime vested the government with authority to punish a felon, so too the government's authority to punish property originated with the taint. Title, once placed in the government by forfeiture, therefore "related back" to that point in time. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-89, 94 S. Ct. 2080, 2090-94 (1974); *United States v. Sandini*, 816 F.2d 869, 871-73 (3d Cir. 1987).

Relation-back thus was from the beginning a fictional creature of *in rem* jurisdiction that "attache[d] to the thing itself, not to any article for which the thing may [have] be[en] exchanged." *See Grundy*, 7 U.S. (3 Cranch) at 354; *see also Buena Vista*, 507 U.S. at 125, 113 S. Ct. at 1135 (plurality opinion) ("[W]e are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture."). The *in personam* liability of tort, in contrast, looks not to the "thing" but to the personal actions of the defendant. There is simply no authority to support the proposition, nor logical reason to conclude, that the *in rem* principle of relation-back can somehow operate to "taint" the character of an individual's admittedly lawful acts after such acts occur.

In *Grundy*, a case whose facts are remarkably similar to the one at bar, Chief Justice Marshall held that the government had no right to pursue, as an adjunct to a forfeiture action, the value of forfeitable property from third parties by means of a conversion-type action founded upon the relation-back fiction.[12] The defendants Grundy and Thornburgh were the assignees in bankruptcy of the property of one Aquila Brown, formerly a merchant and shipowner. One of Brown's ships, the *Anthony Mangin*, was sold by Grundy and Thornburgh to offset Brown's debts. It was later learned, however, that Brown had lied

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[12] Chief Justice Marshall's discussion of the relation-back doctrine still accords with this Court's modern analysis of the issue. *See Buena Vista*, 507 U.S. at 125, 113 S. Ct. at 1135 (plurality opinion) (adopting Chief Justice Marshall's explanation of when forfeiture vests); *id.* 507 U.S. at 126, 113 S. Ct. at 1136.

under oath to register the *Anthony Mangin*. *See* 7 U.S. at 349-50. Under the operative statute, such a falsehood entitled the government either to seek forfeiture of the ship or to obtain the value of the ship *from the person who perpetrated the lie*. *See id.* The government pursued neither statutory alternative but sued Grundy and Thornburgh to gain from them what it could not from the bankrupt Brown. The government framed its suit in *Grundy* as an "action on the case"—the form of pleading from which the tort of conversion later developed. While acknowledging that the operative statute did not support its common law action against the defendants, the government argued, as it argued here, that the statute's limitations did not circumscribe its rights at the common law.

After noting that the government's common law rights were in fact dependent upon the construction of the statute, *see id.* at 351, Chief Justice Marshall rejected the common law claim as a matter of law:

> Has the doctrine of relation such an influence upon this case . . . so as by this fiction of law to make [the United States] the real owners of the vessel at the time of sale, and consequently of the money for which she was sold?
>
> Without a critical examination of the doctrine of relation, it would seem to be a necessary part of that doctrine, that the title to a thing which is to relate back to some former time, must exist against the thing itself, not against some other thing which the claimant may wish to consider as its substitute. . . . Suppose, instead of being sold by the defendants, [the Anthony Mangin] had been exchanged by Aquila Brown himself for another ship, would that other ship have been forfeitable by the doctrine of relation in lieu of the Anthony Mangin?—Clearly not; for the statute gives no such forfeiture. The forfeiture attaches to the thing itself, not to any article for which the thing may be exchanged.

Id. at 354.

The result reached below departs from this settled understanding of the operation of the relation-back fiction by assuming that tort liability is created through a mechanism intended to alter retroactively the ownership of title. Chief Justice Marshall did not permit such a claim in *Grundy*. It should not be allowed to stand here.

CONCLUSION

For the foregoing reasons, Moffitt, Zwerling & Kemler, P.C. respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 95-1884, 95-1916

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MOFFITT, ZWERLING & KEMLER, P.C.,
Defendant-Appellee.

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA;
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amici Curiae.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOFFITT, ZWERLING & KEMLER, P.C.,
Defendant-Appellant.

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA;
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amici Curiae.

Argued March 5, 1996

Decided May 9, 1996

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge LUTTIG and Judge MICHAEL joined.

OPINION

WILKINSON, Chief Judge:

In this appeal, we are asked to resolve important questions about the operation and preemptive effect of the Comprehensive Forfeiture Act of 1984(CFA). 21 U.S.C. § 853. These questions arise out of the government's effort to forfeit, as the proceeds of criminal activity, a $103,800 legal fee paid to the law firm of Moffitt, Zwerling & Kemler. The law firm and the government each allege numerous errors in the district court's rulings. The firm contests the appropriateness of forfeiting the fee when it was not specifically identified as subject to forfeiture in the indictment, and it also appeals the rejection of its claim that it was an innocent transferee under the CFA. We affirm the district court with respect to these assignments of error. The government, in turn, contests the limitations imposed on its efforts to ascertain the disposition of the fee. We affirm in part, and reverse in part the district court's rulings on this matter.

We reverse, however, with respect to the most significant issue raised by this appeal: the preemptive effect of the CFA on state claims of detinue and conversion brought by the government to recover the fee. The government brought these common law actions, in part because the law firm had dissipated most of the $103,800 by the time a restraining order was entered. We hold that these common law actions are consistent with the purposes of the federal forfeiture statute and that the CFA does not abrogate the government's authority to pursue them.

I.

In late August, 1991, William Paul Covington retained the law firm of Moffitt, Zwerling & Kemler to defend him against charges of drug trafficking and money laundering. Covington was then the subject of a grand jury investigation and many of his personal and business assets had already been seized. To secure the firm's representation, Covington was required to pay $100,000 up front. On August 23, 1991, Covington partially paid the fee with a wad of bills fished from his pocket that amounted to $17,000; the next day he delivered another $86,800 in cash, stored in a cracker box or a shoe box. Much of the $103,800 payment was in the form of $100 bills.

Neither William Moffitt nor John Zwerling asked Covington the source of the $103,800, though Moffitt apparently told Covington that, though they could accept cash, they could not accept "funny money." Covington refused a receipt for both payments because, he said, the F.B.I. might find it. The law firm thereafter filed the required Internal Revenue Service Form 8300 reflecting the cash payments from Covington, but failed to identify Covington as the source of the cash transfer.

Once retained, the firm notified prosecutors that they represented Covington. In a series of meetings with law firm members, the prosecutors outlined the nature of their case against Covington and provided a list of assets seized from Covington. These seizures included his home, four cars, a boat, hundreds of thousands of dollars in cash, a motorcycle, and assets of his auto service and towing businesses, namely, two tow trucks and two bank accounts. Prosecutors also disclosed a 50-page affidavit, prepared by an IRS investigator, that supported search and seizure warrants executed against Covington. Among other things, the affidavit reported that Covington had accumulated or spent a vast amount of money in the previous few years, money which the investigator concluded could

only have come from drug trafficking activity. Moreover, the investigator revealed that Covington used his businesses to facilitate drug sales and to launder drug profits.

On October 30, 1991, the grand jury indicted Covington on a variety of drug trafficking, firearm, and money laundering offenses. A superseding indictment was returned on January 9, 1992. Both the original and the superseding indictment contained counts providing for the forfeiture of "any and all properties constituting, or derived from, proceeds" obtained as a result of the illegal activity and any properties used to facilitate that activity. Such assets "include[d], but [were] not limited to" cash of up to $168,000 that the government had not yet located.

On May 12, 1992, after obtaining the approval of the Department of Justice, the government filed a bill of particulars identifying the $103,800 paid to the law firm as subject to forfeiture. It also sought and obtained a restraining order to prevent dissipation of the fee. 21 U.S.C. § 853(e)(1)(A).

In August, 1992, the district court disqualified the law firm from continuing to represent Covington. The judge observed that the most important reason for the disqualification was Covington's statement that while he wanted to plead guilty, he could not because one of his lawyers informed him that such a plea would place the law firm's acceptance of the fee in an unfavorable light. Another important reason for the disqualification related to the government's intention to use evidence concerning Covington's legal fee at trial. J.A. 567-68. New counsel was then appointed.

On September 25, 1992, Covington entered a guilty plea. He was sentenced in February, 1993 to 262 months in prison. At sentencing, pursuant to 21 U.S.C. § 853, and with Covington's consent, the $103,800 fee paid to the law firm was ordered forfeited. Subsequently, the law firm sought to vacate the forfeiture order. It filed a peti-

tion asserting that it was "reasonably without cause to believe" that the fee was subject to forfeiture. 21 U.S.C. § 853(n)(6)(B). The district court rejected the petition. *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463 (E.D.Va.1994) ("*Moffitt I*").

Thereafter, the government sought a final decree of forfeiture to collect the $103,800 from Moffitt, Zwerling. The firm maintained, however, that recovery was limited to the $3,695 that remained unspent at the time the district court entered the May, 1992 restraining order. Nearly all of the $103,800 fee was spent, in fact, as early as January, 1992. In response, the government pursued a number of remedies to retrieve some or all of the fee. First, it argued that the firm, under § 853, was liable to the government for the full $103,800; the district court rejected this claim. *In re Moffitt, Zwerling & Kemler, P.C.*, 864 F. Supp. 527 (E.D.Va.1994) ("*Moffitt II*"). Next, the government sought forfeiture of any property traceable to the fee as property "derived from" forfeitable assets. 21 U.S.C. § 853(a). Finally, to recover the fee, government brought common law actions of detinue and conversion under Virginia law. The district court ruled on a variety of discovery disputes arising from the tracing effort, *In re Moffitt, Zwerling & Kemler, P.C.*, 875 F.Supp. 1152 (E.D.Va.1995) ("*Moffitt III*"), and it ruled that the state common law actions were preempted by the CFA. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 875 F.Supp. 1190 (E.D.Va.1995) ("*Moffitt IV*"). Both the government and the law firm now appeal certain aspects of these rulings.

II.

We first address the alleged improprieties in the procedure employed by the government to subject the fee to forfeiture. Moffitt, Zwerling contends that the district court lacked jurisdiction to order forfeiture of the fee because that fee was not specified in the indictment. This

claim is meritless. First, the indictment and the superseding indictment contained forfeiture counts naming "any and all properties constituting, or derived from" or used to facilitate criminal activities. The list of assets "include[d], but [was] not limited to . . . [a]ny and all interest of WILLIAM PAUL COVINGTON in $168,000 in United States currency." The indictment thus sought forfeiture of all the proceeds of Covington's criminal activity, explicitly including up to $168,000 not yet accounted for.

Moreover, the law firm's claim rests on the assumption that forfeiture is a substantive element of the offense, and therefore must be specified in the indictment. *Stirone v. United States,* 361 U.S. 212, 218-19, 80 S.Ct. 270, 273-74, 4 L.Ed.2d 252 (1960). But the Supreme Court and this court have conclusively rejected the argument that forfeiture is a substantive element of offenses. *Libretti v. United States,* —— U.S. ——, ——, 116 S.Ct. 356, 363, 133 L.Ed.2d 271 (1995) ("Forfeiture is an element of the sentence imposed *following* conviction . . . .") (emphasis in original); *United States v. Tanner,* 61 F.3d 231, 234 (4th Cir.1995) ("It is clear that forfeiture under § 853 is in fact punishment."), *cert. denied,* —— U.S. ——, 116 S.Ct. 925, 133 L.Ed.2d 854 (1996); *see also Alexander v. United States,* 509 U.S. 544, ——, 113 S.Ct. 2766, 2775, 125 L.Ed.2d 441 (1993) (criminal forfeiture is "a form of monetary punishment"). The conclusion that forfeiture is punishment, and not a substantive element of the offense, follows inexorably from the plain terms of § 853, which allow the forfeiture of assets of those "convicted," 21 U.S.C. § 853(a), and provides that forfeiture shall be imposed "in addition to any other *sentence* imposed." *Id.* (emphasis added).

Moffitt, Zwerling is correct that the government first specifically identified the $103,800 fee as subject to forfeiture in a bill of particulars filed after the superseding indictment. But this hardly dooms the forfeiture order.

A bill of particulars is an appropriate way to pinpoint certain assets, noted in the indictment, as subject to forfeiture. *United States v. Strissel*, 920 F.2d 1162, 1166 (4th Cir.1990); *United States v. Raimondo*, 721 F.2d 476, 477-78 (4th Cir.1983), *cert. denied*, 469 U.S. 837, 105 S.Ct. 133, 83 L.Ed.2d 74 (1984); *see also Libretti*, —— U.S. at ——, 116 S.Ct. at 366. Moreover, the firm itself was in part responsible for the government's delay because it failed to identify Covington as the source of the cash payment on the required IRS forms. *Moffitt II*, 864 F.Supp. at 543 n.45. It is also difficult to identify any prejudice to the law firm from the procedure followed here: the firm does not even contest the district court's finding that the $103,800 fee represented the proceeds of criminal activity. *Moffitt I*, 846 F.Supp. at 468.

The law firm maintains, however, that the procedure followed here unconstitutionally upsets the balance between the state and the accused. This argument is little more than an attempted end-run around *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989), which squarely rejected constitutional claims lodged against attorney fee forfeiture. There is simply no constitutional right to "spend another person's money for services rendered by an attorney." *Id.* at 626, 109 S.Ct. at 2652. The potential conflict between attorney and client posed by the forfeiture of this tainted fee resulted from the law firm's acceptance of the fee not from the government's effort to forfeit it. In fact, the district court disqualified the law firm here in part because of disturbing testimony from Covington that the law firm's desire to protect its fee was overriding its obligation to represent its client. And though Moffitt, Zwerling vigorously asserts the risk of prosecutorial bad faith where the government follows the procedure it did here, the district court, "after extensive review of the record, conclud[ed] that there is no factual predicate for asserting a claim of prosecutorial abuse." J.A. 759.

In sum, we find no impropriety in the procedures employed by the government in this case to subject the fee to forfeiture.

III.

Moffitt, Zwerling further argues that its fee was not subject to forfeiture because it qualified as an innocent transferee whose assets could not be forfeited. *See* 21 U.S.C. §§ 853(c) & 853(n). It was, it claims, "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B). After an extensive evidentiary hearing, however, the district court disagreed, concluding that: "[T]he record, taken as a whole, compels the conclusion that the Law Firm's belief that the cash fee came from legitimate sources was not reasonable in the circumstances." *Moffitt I*, 846 F. Supp. at 472.

We can find no fault with the district court's conclusion. Covington approached Moffitt, Zwerling as a known target of a far-reaching drug trafficking investigation. As the law firm knew, the government suspected that Covington was the leader of a major cocaine ring, *id.* at 473, and the government had seized nearly all of his personal and business assets. *Id.* at 470, 473. The extensive seizures were, as the law firm also knew, based on a judicial officer's determination that there was probable cause to believe the assets were subject to forfeiture. *Id.* at 473. Covington himself told the firm's partners that he used his businesses to facilitate drug dealing, *id.* at 469-70, 473, and the firm was aware of the government's conclusion that the considerable amount of money Covington had accumulated and spent could have only resulted from his drug trafficking activities. *Id.* at 470-71, 473. Despite this, the firm accepted from Covington two immense cash payments, totalling $103,800 and largely comprised of $100 bills, over a two-day period. At Covington's request, the firm did not give him a receipt for the $103,800 because Covington feared the receipt might fall into the

hands of the F.B.I. *Id.* at 473. Such circumstances were, to put it mildly, highly suspicious.

The firm contends that its partners believed, based on their extensive interviews with him, that Covington had "squirreled" away substantial assets from legitimate business activity. And the firm asserts that Covington was informed that he could not pay in "funny money." The district court found, however, that Covington advised the firm's partners that he was broke, and for that reason continued to engage in illegal activity. *Id.* at 470, 473; J.A. 1062. In addition, during the supposedly extensive interviews with Covington, the firm's partners tiptoed around the most pertinent questions. They did not even ask Covington what legitimate sources of income he had. And, conspicuously, they avoided asking Covington exactly where he had obtained the $103,800 in cash to pay his legal fee. *Moffitt I* at 470, 474. In their meetings with Covington the lawyers did not seek to obviate doubts that any person would have had about the source of Covington's substantial cash payment. The meetings, in fact, create the impression that the participants were engaging in some sort of wink and nod ritual whereby they agreed not to ask—or tell—too much.

Based on this record, the district court observed, there was nothing less than a "mass of evidence available to the Law Firm partners in August 1991 that pointed convincingly to the conclusion that the cash fee constituted, or was derived from, drug trafficking proceeds." *Id.* at 475. We agree. Both what the law firm knew in August, 1991, and what it declined to inquire about, convinces us that it reasonably had cause to know that the $103,800 was subject to forfeiture, and thus its § 853(n)(6) petition was properly rejected.

IV.

The government thereafter sought a final decree of forfeiture for the $103,800. According to the law firm, the

government's recovery was limited to $3,695, the amount of the fee that remained when the restraining order was entered in May, 1992. Seeking to recover the full amount of the fee, however, the government argued that under 21 U.S.C. § 853 the law firm was obligated to remit to the government the entire $103,800. The district court rejected this argument, *Moffitt II*, 864 F.Supp. 527, but observed that the government might have other remedies available to it, such as a state law conversion action, to recover the fee. *Id.* at 544 n. 49. Consequently, the government brought common law actions of conversion and detinue under Virginia law to recover the full $103,800. The district court, however, ruled that the federal forfeiture law preempted the government's ability to bring those actions. *Moffitt IV*, 875 F.Supp. at 1203-07.

We thus turn to the preemptive effect of the Comprehensive Forfeiture Act.[1] Because the CFA does not contain an express preemption provision, the question is whether it, by implication, overrides state law. The law firm argues, and the district court agreed, that under the principles of implied conflict preemption the government cannot pursue the common law actions of detinue and conversion. *Id.*[2] We believe, however, that common law

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[1] "The CFA added or amended forfeiture provisions for two classes of violations under federal law, racketeering offenses and CCE offenses, see 98 Stat. 2040-2053, as amended." *United States v. Monsanto*, 491 U.S. 600, 603 n. 1, 109 S.Ct. 2657, 2660 n. 1, 105 L.Ed.2d 512 (1989). In this opinion, we refer to the portion of the CFA that authorizes forfeiture for continuing criminal enterprise (CCE) offenses. *See* 21 U.S.C. § 853.

[2] Federal preemption under the Supremacy Clause is fundamentally a question of whether a state law "conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. General Electric Co.*, 496 U.S. 72, 79-80 n. 5, 110 S.Ct. 2270, 2275 n. 5, 110 L.Ed.2d 65 (1990). Such an intent can be identified in a number of ways, *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995), but, other than implied conflict preemption, none are relevant

actions are available to the government in its effort to forfeit the fee.

A.

We start from the premise that federal statutes do not, by implication, abrogate the government's right to bring common law suits. This controlling principle is derived directly from *United States v. Texas*, 507 U.S. 529, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993). As in this case, *Texas* involved a claim that a federal statute extinguished the right of the United States to pursue collection efforts under common law. In *Texas*, the Supreme Court held that the Debt Collection Act of 1982 did not abrogate the federal government's common law right to recover prejudgment interest against states, even though the Act did not explicitly make such interest recoverable from the states. *Id.*

The right exercised by the federal government in *Texas* to bring suit at common law was a long-standing one. The roots of this authority can be traced to the First Judiciary Act of 1789. Act of Sept. 24, 1789, § 9, 1 Stat. 73, 77 (granting federal district court jurisdiction over "all suits at common law where the United States shall sue."). Federal courts currently exercise original jurisdiction over "civil actions, suits, or proceedings" brought by the United States. 28 U.S.C. § 1345. Under this authority, the United States can bring common law actions "claiming in its contractual and proprietary relations the same protection of the general law, at least, that belong[s] to any other legal person." Paul Bator et al., *Hart and Wechsler's Federal Courts and the Federal System* 911 (3d ed.1988); *see also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-86, 8 S.Ct. 850, 853-58, 31 L.Ed. 747 (1888); *Jessup*

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here. In particular, there is no "actual conflict" between the CFA and the state claims brought by the government because it would not be "impossible for a private party to comply with both state and federal" law. *English*, 496 U.S. at 79, 110 S.Ct. at 2275.

v. United States, 106 U.S. 147, 152, 1 S.Ct. 74, 78-79, 27 L.Ed. 85 (1882). As in *Texas,* the federal government has done nothing more here than exercise an established right to bring common law actions, in this case ones of conversion and detinue. *See United States v. Union Livestock Sales Co.,* 298 F.2d 755 (4th Cir.1962) (conversion action); *United States v. Butt,* 203 F.2d 643 (10th Cir. 1953) (same).

The question, then, is whether the CFA somehow abrogated this recognized right on the part of the United States. The CFA, like the Debt Collection Act in *Texas,* "does not speak directly to the Federal Government's right to" pursue state common law claims against par ties like Moffitt, Zwerling. *Texas,* 507 U.S. at 534, 113 S.Ct. at 1634-35. Notwithstanding the statutory silence, the *Texas* Court held the government's common law rights remained intact. The Supreme Court noted that: " 'Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area.' " *Id.* at 535, 113 S.Ct. at 1635 (citation omitted). The unmistakable import of *Texas,* then, is that common law remedies possessed by the United States will not be extinguished by congressional failure to re-affirm their validity.

Texas is not alone in holding that common law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights. This principle has been affirmed and re-affirmed many times. *See Wisconsin Central Railroad Co. v. United States,* 164 U.S. 190, 210-11, 17 S.Ct. 45, 51-52, 41 L.Ed. 399 (1896) (common law remedy of offset to recoup monies already paid not abrogated by statutory authorization of fraudulent payment remedy); *Cecile Indus., Inc. v. Cheney,* 995 F.2d 1052, 1054-56 (Fed.Cir.1993) (common law remedy of offsetting contract debts against contract payments not

abrogated by Debt Collection Act's statutory remedies); *United States v. Kearns,* 595 F.2d 729, 732-33 (D.C.Cir. 1978) (common law remedy of breach of fiduciary duty not abrogated by bribery and fraud statutes); *Continental Management, Inc. v. United States,* 208 Ct.Cl. 501, 527 F.2d 613, 620 (Cl.Ct.1975) (same); *United States v. Mead,* 426 F.2d 118, 124-25 (9th Cir.1970) (common law remedy of payment by mistake not abrogated by False Claims Act's statutory remedies); *United States v. Borin,* 209 F.2d 145, 148 (5th Cir.) (common law remedy of fraud not abrogated by False Claims Act's statutory remedies), *cert. denied,* 348 U.S. 821, 75 S.Ct. 33, 99 L.Ed. 647 (1954); *United States v. Silliman,* 167 F.2d 607, 610-11 (3d Cir.) (common law remedies not abrogated by False Claims Act), *cert. denied,* 335 U.S. 825, 69 S.Ct. 48, 93 L.Ed. 379 (1948).

Moffit, Zwerling responds, however, that this case is distinguishable from *Texas* because the government relies on the federal forfeiture statute to establish certain elements of the common law actions. It is true that to establish its right to possession of the fee, the government relies on the relation back doctrine. That doctrine, codified at 21 U.S.C. § 853(c), retroactively vests title in the United States as of the date of the activity giving rise to the forfeiture. *See Caplin & Drysdale,* 491 U.S. at 627, 109 S.Ct. at 2653. The government's reliance on this doctrine, however, to establish one element of a common law cause of action does not remove this case from the reach of *Texas.* To prohibit the government from availing itself of a statutory right that Congress conferred upon it would arbitrarily restrict the government's ability to pursue its remedies at common law. Just as any party might rely on legal or contractual authority to establish a right to possess a piece of property, the government has the perfect right to point to other provisions of law that confer a right to possession of the fee.

B.

Even accepting the general premise of *Texas,* however, Moffitt, Zwerling argues that, under this particular statute, the government's common law actions are preempted because they conflict with the objectives of the CFA. For support, the firm points to the "substitute asset" provision of 21 U.S.C. § 853(p). Under that provision, if forfeitable assets are unavailable at the time of forfeiture order is entered, the government has a statutory right to obtain "any other property of the defendant up to the value" of those assets. *Id.* Section 853(p), however, says nothing about the recovery of substitute assets from third parties (as opposed to defendants) who had reason to know that the fee was subject to forfeiture. This silence, according to the law firm, indicates that one purpose of the CFA is to protect third party transferees who no longer possess property that would otherwise be forfeited. The law firm argues that permitting actions in conversion and detinune would "stand[] as an obstacle to the accomplishment of the full purposes and objectives" of the CFA. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984).

The firm's argument that the CFA preempts state common law actions by negative implication is faulty on several grounds. To begin with, a court approaches preemption claims "with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed. 2d 576 (1981). This assumption has particular force here because Congress explicitly stated that the federal drug laws do *not* generally preempt state law. 21 U.S.C. § 903. In fact, federal anti-drug laws override state law only if "there is a positive conflict between [state law and federal law] so that the two cannot consistently stand together." *Id.* There cannot be such a "positive" conflict when Congress has not seen fit to prohibit the conversion or detinue actions that state common law has permitted.

Far from creating a positive conflict, much less impeding the purposes of the CFA, the state actions pursued by the government *promote* the aims of the statute. As a general matter, the CFA broadly defines property subject to forfeiture and requires that "any" property derived from or used to facilitate criminal activity "shall" be forfeited upon conviction. 21 U.S.C. § 853(a). Its provisions were specifically designed to ease the government's ability to track down the proceeds of crime. *See, e.g.*, 21 U.S.C. §§ 853(c)-(f), (k). One of the most powerful tools contained in the CFA is the relation back provision, 21 U.S.C. § 853(c), which allows the government to reach forfeitable assets transferred to third parties. Explicitly intended to effectuate the extensive forfeiture scheme by closing a loophole in the existing forfeiture laws, § 853(c) prevents defendants from shielding their assets from forfeiture "simply by transferring an asset to a third party." S.Rep. No. 225, 98th Cong., 2d Sess. 196, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3379.

Congress did not, on the one hand, provide the government with this powerful array of remedies, and then, on the other, deprive it *sub silentio* of its common law rights of action. To the contrary, the CFA is to be "liberally construed to effectuate its remedial purposes." 21 U.S.C. § 853(*o*). Those purposes, in a nutshell, are to "give force to the old adage that 'crime does not pay.'" *Monsanto*, 491 U.S. at 614, 109 S.Ct. at 2665. It is with that precise objective in mind that the government pursued common law actions against Moffitt, Zwerling, a third party transferee that dissipated a legal fee it had cause to know came from criminal activity. The common law claims further, rather than frustrate, what Congress intended to accomplish when it authorized the forfeiture of property derived from drug dealings. Indeed, it would run counter to the aims of the Act to disapprove of these state law actions.

We find Moffitt, Zwerling's arguments to the contrary unconvincing. It is true that the CFA recognizes and protects the interests of third-party transferees. The extent of that protection, however, is spelled out in § 853(n), which prevents the forfeiture of assets held by innocent third parties. The law firm was given the full benefit of this provision, but it failed utterly to demonstrate that it was an innocent transferee. It is also true, as the law firm points out, that only defendants are explicitly named as subject to the substitute assets provision. 21 U.S.C. § 853(p). Naming only defendants, however, was a logical step. The government's need to recover substitute assets will arise far more often in the case of defendants than it will with third-party transferees. No provision of the CFA, however, can be read to provide insulation from common law actions for transferees who hurriedly spent assets they had reason to know were the proceeds of crime. In fact, the substitute assets provision of § 853(p) was enacted to make the government's forfeiture efforts more effective. It would be astonishing if a provision designed by Congress to augment the government's forfeiture remedies were held to abrogate common law actions and thereby restrict the government's forfeiture efforts. *See Texas*, 507 U.S. at 536-37, 113 S.Ct. at 1635-36.

We also are not persuaded by the district court's view that the detinue and conversion actions *might* conflict with the CFA and are thus preempted. The district court observed that a party may be liable in detinue or conversion even if the transferee had no reason to know that the property was tainted and that holding such a party liable would conflict with the innocent-transferee provision of the CFA. *Moffitt IV*, 875 F.Supp. at 1205 & n. 33. The short answer to this concern is that there is no such conflict in this case because Moffitt, Zwerling was not an innocent transferee under § 853(n). And "[t]he existence of a hypothetical or potential conflict is insufficient to

warrant [] pre-emption." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982).

C.

As a final matter, Moffitt, Zwerling appears to rely generally on the comprehensiveness of the CFA to buttress its view that there is no place in forfeiture law for state causes of action. This argument is nothing more than a backdoor way of claiming that Congress intended to occupy the field to the exclusion of state law. *English*, 496 U.S. at 79, 110 S.Ct. at 2275. The anti-drug laws, however, explictly disavow "an intent on the part of the Congress to occupy the field." 21 U.S.C. § 903. Moreover, state law has traditionally been relied upon to resolve questions of property rights and interests arising under the CFA. *See United States v. Certain Real Property at 2525 Leroy Lane*, 910 F.2d 343, 347-49 (6th Cir.1990), *cert. denied*, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991). And, of course, the anti-drug laws authorize the federal government to cooperate with state and local governments in efforts aimed at drug trafficking. *See* 21 U.S.C. § 873. The Attorney General is authorized to assist states in "the institution and prosecution of cases in the courts of the United States and . . . courts of the several States," 21 U.S.C. § 873(a)(2), and in "conducting investigations and prosecutions" of the diversion of legitimate drugs to illegitimate uses, § 873(d)(1)(B). In short, the claim that Congress regulated so pervasively in the field of forfeiture as to make "no room" for state law is groundless. *English*, 496 U.S. at 79, 110 S.Ct. at 2275 (citation omitted).

V.

The government's common law actions of detinue and conversion are thus not preempted by the CFA. We next address whether the government has stated the required elements of a conversion claim.

We affirm the district court's judgment that the government has stated the elements of a conversion action. Conversion is the "wrongful exercise or assumption of authority . . . over another's goods . . ." *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 440 S.E.2d 902, 905 (1994) (quoting *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 92 S.E.2d 359, 365 (1956)); *see also McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531, 535 (4th Cir.1991), *cert. denied*, 502 U.S. 1048, 112 S.Ct. 912, 116 L.Ed.2d 813 (1992). To make out a conversion action in Virginia the government must have had an immediate right to possess the $103,800 at the time it was allegedly wrongfully converted by the law firm. *United Leasing*, 440 S.E.2d at 906. The key dispute is whether the government had such a right to possession.

Under the relation back doctrine codified in § 853(c), the government had the right to possess the $103,800 at the time the law firm received it in August, 1991. 21 U.S.C. § 853(c). No provision of the CFA suggests that § 853(c) cannot be relied upon to establish one element of a conversion action. Moffitt, Zwerling emphasizes, however, that the government did not actually gain title to the $103,800 until the entry of the forfeiture order. But once the forfeiture order was entered, the government's title dated back in time to the criminal activity giving rise to the forfeiture, a date which necessarily was prior to August, 1991. *See United States v. Parcel of Rumson, N.J. Land*, 507 U.S. 111, 125-27, 113 S.Ct. 1126, 1135-36, 122 L.Ed.2d 469 (1993). The government therefore had a right to possess the $103,800 in August, 1991.[3]

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[3] In view of our holding on the question of conversion, we need not address the district court's ruling that the government failed to state the elements of its detinue action. *See Moffitt IV*, 875 F.Supp. at 1198-99.

VI.

We finally address the government's contention that the district court improperly constrained its efforts to uncover property traceable to the $103,800. Such property, if not in the hands of an innocent transferee under § 853(n), is forfeitable under the CFA. *See* 21 U.S.C. § 853(a)(1) (forfeitable assets include any property *derived from* criminal proceeds). To "facilitate the identification and location of property declared forfeited," § 853 authorizes district courts to order discovery, including depositions and the production of any "book, paper, document, record, recording, or other material not privileged." 21 U.S.C. § 853(m). The government argues that its effort to conduct discovery under this provision was inappropriately restricted to documents and descriptions provided by the law firm itself. It also argues that the district court erred in not subjecting law firm partner Lisa Kemler to discovery to determine if she held traceable property.

The district court oversaw an extensive discovery effort in this case. In the many rulings issued by the district court, some limits were placed on the government, but the law firm was also required to turn over considerable documentation regarding the disposition of the $103,800. A district court enjoys wide discretion in guiding tracing efforts and entering final forfeiture orders, *see* 21 U.S.C. §§ 853(g) & (m), and we do not intend to supervise the details of the complex discovery conducted in this case. Moreover, given that the government has the conversion remedy available to it, the district court will be required to weigh in the discovery balance the relative ease of recovery of the forfeitable property under this common law route.

The district court, however, did place two artificial limits on the government's tracing efforts. First, the court cut off all discovery with respect to payments by the law firm to corporations owned, in whole or in part, by law firm partners and their spouses. *Moffitt III*, 875 F. Supp. at 1163. Such corporations, however, could be a

natural place for dispersal of the fee and payments to those corporations might result in traceable property. Particularly because the law firm dissipated so much of the fee before the restraining order was entered, the government had to be afforded a reasonable opportunity to follow the trail of the forfeitable property that made its way to corporations and partnerships closely associated with the law firm.

Second, the district court completely barred discovery regarding law firm partner Lisa Kemler because, it found, she was likely to qualify as an innocent transferee under § 853(n). *Moffitt III*, 875 F.Supp. at 1162; J.A. 1657-59. However, Kemler never filed any § 853(n) petition. It was Kemler's burden to demonstrate that she was an innocent transferee and the district court had already rejected the §853(n) petition filed on behalf of the law firm as an entity. Kemler participated in Covington's defense, she helped carry the cash payment to the bank for deposit, and she participated in at least one of the initial meetings with prosecutors regarding Covington's case. In this context, cutting off all discovery with respect to her was in error.

VII.

Moffit, Zwerling has sought throughout this litigation to focus attention on the government's conduct. We understand that situations may arise in which the government abuses the power to seek forfeiture, which is undoubtedly a "powerful weapon[] in the war on crime." *Caplin & Drysdale*, 491 U.S. at 634, 109 S.Ct. at 2657. We also reiterate that the right to the assistance of counsel in the presentation of one's own defense is among the great liberties that a free people enjoys.

Neither prosecutorial misconduct nor an infringement of the constitutional right to counsel, however, is at issue in this litigation. What this lawsuit has brought to light is troubling conduct of a different kind. The law firm in this case was dealing with a client who already had

most of his assets seized as the result of a major drug trafficking investigation. The firm accepted an immense cash payment from the client composed largely of $100 bills and stuffed into a shoe box or a Ritz cracker box. And the firm complied with its client's request not to provide a receipt for fear, the client said, it would fall into the hands of law enforcement authorities. Perhaps most disturbing, the district court disqualified the firm from this case in part because of evidence that the firm tried to dissuade its own client from negotiating with the government because of the unfavorable effect a guilty plea might have on the law firm's fee. *Moffitt I*, 846 F.Supp. at 467; J.A. 567-68. This conduct disappoints. It falls far short of what America expects from the members of one of its most privileged professions.

For the foregoing reasons, the district court's judgment is affirmed in part, and reversed in part. The case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

Civ. A. No. 94CV1384

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOFFITT, ZWERLING & KEMLER, P.C.,
Defendant.

Feb. 10, 1995

MEMORANDUM OPINION

ELLIS, District Judge.

This detinue and conversion action is in reality yet another chapter in a lengthy criminal forfeiture saga. The saga grows out of the payment of $103,800 of attorneys' fees to Moffit, Zwerling & Kemler, P.C. (the "Law Firm") by a client who obtained the money through drug trafficking.[1] Until now, the government's forfeiture efforts have relied solely on the federal scheme for criminal forfeiture set forth in 21 U.S.C. § 853. Previous chapters in the saga chronicle these efforts, which have not been entirely successful. Because the Law Firm spent almost all of the

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[1] *See In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463 (E.D.Va.1994), *appeal dismissed*, No. 94-5167 (4th Cir. June 28, 1994) (hereinafter *Moffitt I*).

$103,800 before the government obtained a restraining or forfeiture order, the government, in seeking forfeiture under § 853, is now limited to recovering property traceable to, or derived from, the $103,800.[2] At present, the government is engaged in what is proving to be a difficult and complex effort to identify traceable property held by the Law Firm and its partners.[3] Seeking to avoid the complexities and difficulties of tracing, the government has filed the instant action in detinue and conversion under Virginia's common law. In this action, the government alleges that the Law Firm wrongfully converted or detained $103,800 that belonged to the government by virtue of federal forfeiture law, and is therefore liable for that amount plus interest, regardless of how or when the Law Firm spent the $103,800.

The matter is now before the Court on cross motions, the government's motion for summary judgment and the Law Firm's dismissal motions. For the reasons stated, the Law Firm's motion to dismiss must be granted, thereby rendering moot the government's motion for summary judgment.

I.[4]

In August 1991, William P. Covington was under investigation for distribution of cocaine, and sought to retain the Law Firm to defend him. On August 23 and 24, Covington paid $103,800 cash to the Law Firm, money which the Law Firm promptly deposited in several bank accounts. The government's investigation of Covington soon bore fruit. On October 30, he was indicted

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[2] *See In re Moffitt, Zwerling & Kemler, P.C.*, 864 F.Supp. 527 (E.D.Va.1994) (hereinafter *Moffitt II*).

[3] *See In re Moffitt, Zwerling & Kemler, P.C.*, 875 F.Supp. 1152 (E.D.Va.1995) (hereinafter *Moffitt III*).

[4] The facts involved in this matter have been extensively presented in *Moffitt I, Moffitt II, and Moffitt III*. Only those facts necessary for context and the resolution of the questions presented are set forth here.

on drug trafficking, firearms, and money laundering charges. A superseding indictment followed on January 9, 1992. The indictments included broad forfeiture counts covering all of Covington's property derived from criminal activity.

The government eventually became aware of the $103,800 fee payments made by Covington. On May 11, 1992, the government filed a bill of particulars identifying the fees as property subject to forfeiture. The following day, the Court, on the government's motion, entered a restraining order with respect to the $103,800 and property traceable to it. By this time, however, over eight months had passed and the Law Firm no longer had most of the $103,800. With the exception of $3,695 held in an escrow account on Covington's behalf, the Law Firm had disbursed the remainder of the money in the ordinary course of its business.

Covington eventually pled guilty to several charges. At his sentencing on February 25, 1993, the Court ordered the forfeiture under 21 U.S.C. § 853(a) of all property constituting the proceeds of Covington's drug trafficking. The next day, pursuant to § 853(c), the Court ordered the forfeiture of the $103,800 that Covington transferred to the Law Firm, subject to the rights of third parties to be asserted under § 853(n). Thereafter, the Law Firm filed a § 853(n) petition, contending that it was a bona fide purchaser "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B). After a full evidentiary hearing, the Court denied the petition, finding that the Law Firm had not met its burden of proving that it was reasonably without cause to know of the prospect of forfeiture. *See Moffitt I*, 846 F.Supp. at 472-76.

The government then proposed a final decree of forfeiture of the $103,800, which the Law Firm opposed on the ground that, with the exception of $3,695, it had spent

the money received from Covington long before the entry of the May 1992 restraining order or the February 1993 forfeiture order. In response, the government advanced several theories to support the Law Firm's obligation to pay $103,800 to the government, notwithstanding that the bulk of the money had already been spent. First, the government argued that money is fungible and interchangeable under § 853, and therefore any money held by the Lam Firm was subject to forfeiture. Second, the government argued that because it gained title to the $103,800 under the February 1993 forfeiture order, it could recover that amount from the Law Firm in a civil action for conversion under Virginia's common law. Further, the government contended that it could raise such a conversion claim in the context of the forfeiture proceeding, because § 853(g) authorizes courts to take actions to "protect the interest of the United States in the property ordered forfeited." The Court rejected each of the government's arguments.[5]

Although the government failed on these theories, it succeeded in establishing that § 853 provides for forfeiture of property "derived from" criminal proceeds, and therefore requires forfeiture of property traceable to the $103,800. 21 U.S.C. § 853(a); *Moffitt II*, 864 F.Supp. at 541-52. Thus, the government next turned its attention to determining what happened to the $103,800 and whether the Law Firm or its partners obtained property

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[5] With respect to the government's conversion theory, the Court held that § 853(g) merely empowers courts to preserve forfeited property, but does not permit courts to entertain state-law claims for recovery of property not forfeited under § 853's provisions. *Moffitt II*, 864 F.Supp. at 539-40. The Court expressly noted that it reached no decision on whether the government could proceed against the Law Firm in a separate civil action based on some state-law theory, such as conversion. Similarly, the Court noted that it did not reach the question whether the determination of title under § 853 would be binding in such a state-law action. *Id.* at 540-41 n. 38, 544 n. 49.

traceable to it. That effort, including the related discovery, is currently ongoing. *See Moffitt III.*

The government commenced the instant action on October 21, 1994.[6] It is a civil action that seeks return of the $103,800 on two alternative theories, conversion and detinue.[7] The complaint alleges that title to the $103,800 vested in the United States at the time of Covington's criminal activities by virtue of § 853. As a result, the government contends that the Law Firm, whether or not it has spent the money, is now liable in detinue or conversion under Virginia's common law for its wrongful possession or conversion of the money.

The government seeks summary judgment on the ground that the undisputed facts establish the elements of conversion and detinue. The Law Firm counters with four grounds for dismissal, namely that (i) the government's action is barred by claim preclusion, (ii) the government, bound by having pursued federal criminal forfeiture, cannot now sue in detinue or conversion, (iii) the government has not established the requisite elements of a detinue or conversion claim, and (iv) the action is preempted by federal forfeiture statutes. If none of these grounds for dismissal succeed, the Law Firm contends that summary judgment for the government is still improper because there are disputed factual issues to be developed.[8] The parties having fully briefed and argued the issues raised, this matter is now ripe for disposition.

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[6] Subject matter jurisdiction in this matter arises under 28 U.S.C. § 1345, which provides that district courts have original jurisdiction of civil actions commenced by the United States.

[7] The government also seeks interest for the period of the Law Firm's wrongful possession of the $103,800.

[8] The Law Firm argues that, even if the matter is not dismissed, summary judgment for the government is improper because it needs discovery to prepare some defense, such as laches or estoppel, based on the government's delay in seeking this forfeiture. *See Moffitt III*, 875 F.Supp. at 1160 (discussing such delay's effect on

II.

Claim preclusion, or *res judicata*, generally applies where (i) the prior action results in a judgment on the merits, (ii) the prior and subsequent action involve claims by the same parties or their privies, and (iii) the prior and subsequent action arise out of the same transaction or series of connected transactions. *Aliff v. Joy Manufacturing Co.*, 914 F.2d 39, 42-43 (4th Cir.1990); *Harnett v. Billman*, 800 F.2d 1308, 1313-14 (4th Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987). As long as the two actions arise from the same transaction, claim preclusion applies even if the actions raise different legal theories. *Aliff*, 914 F.2d at 43. Yet, claim preclusion does not apply where a plaintiff could not pursue certain theories or claims in the first action because of limitations on the court's authority or jurisdiction to entertain them. *Davenport v. North Carolina Dept. of Transportation*, 3 F.3d 89, 97 n. 8 (4th Cir.1993) (plaintiff risks claim preclusion by not joining all theories in first action only if forum exists that can handle all claims); Restatement 2d (Judgments) § 26 (1988).

Applied here, these principles compel the conclusion that claim preclusion does not bar the government's conversion and detinue claims. To be sure, the Law Firm is correct that the government's detinue and conversion claims arise from the same transaction as the forfeiture action. Yet, as the government notes, it had no opportunity to present the conversion and detinue claims in the federal criminal forfeiture case. Indeed, the government made precisely such an attempt when it sought unsuccessfully to assert a conversion claim in the forfeiture proceed-

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tracing proceeding). The government responds that (i) laches is not a defense to its claims, (ii) laches is not available against the government, and (iii) there has been exhaustive factual development of this case already. Because the Law Firm demonstrates proper grounds for dismissal, it is unnecessary to resolve these issues.

ing on the basis of § 853(g). *Moffitt II*, 864 F.Supp. at 539-40. For the same reasons, the government also could not have pursued a detinue claim in the forfeiture proceeding. Claim preclusion therefore does not bar the present action.[9]

III.

The doctrine of election of remedies also does not bar the government's detinue and conversion action. The Law Firm argues that the government cannot pursue a detinue or conversion action after having sought criminal forfeiture of the $103,800. It relies, by analogy, on recent cases finding that the Double Jeopardy Clause prevents the government from pursuing separate criminal and civil forfeiture proceedings against a criminal defendant.[10]

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[9] The Law Firm also argues that § 853's legislative history reflects Congress's desire that claims regarding forfeitable property be settled quickly and not in piecemeal fashion. *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. 208 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3384, 3391. While true, this general desire is of no help to the Law Firm; it does not itself prevent the assertion of conversion or detinue claims against property also subject to § 853 forfeiture proceedings. At most, this legislative history indicates that § 853(n) petitions, claims by third parties interested in forfeited property, should be ancillary to the main forfeiture action, rather than being resolved as separate actions. The present action is not a § 853(n) petition, nor is it brought by a third party wishing to prevent a forfeiture. Quite simply, this general legislative history is not relevant here.

[10] *See United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1222 (9th Cir.1994) (criminal prosecution and civil forfeiture action based on same offense must be brought in same proceeding, that is, same indictment); *United States v. Torres*, 28 F.3d 1463, 1464 (7th Cir.1994) (stating same rule, but finding Torres was not party to forfeiture proceeding that preceded criminal prosecution because he made no claim to forfeited property), *cert. denied*, —— U.S. ——, 115 S.Ct. 669, 130 L.Ed.2d 603 (1994). By contrast, double jeopardy does not occur when the government pursues criminal penalties and civil forfeiture in one simultaneous proceeding. *See United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17, 19-21 (2d Cir.1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 922, 127 L.Ed.2d 215 (1994).

These cases stem from recent Supreme Court opinions indicating that civil forfeiture may constitute punishment for double jeopardy purposes if designed in part to deter or punish.[11] Yet, double jeopardy is not present here because neither the government's § 853 forfeiture action nor the instant action constitutes punishment of the Law Firm. Section 853's purpose is to punish only criminal defendants. It is not meant to punish third parties, even those who receive property with reason to know it is subject to forfeiture. *See Moffitt II*, 864 F.Supp. at 543-44. Moreover, where criminal proceeds are at issue, it is well established that forfeiture serves remedial, rather than punitive, purposes. *See S.E.C. v. Bilzerian*, 29 F.3d 689, 696 (D.C.Cir.1994); *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994); *Moffitt I*, 846 F. Supp. at 476. It is equally clear that Virginia's law on detinue and conversion is intended to allow recovery of property and to remedy injuries resulting from interference with property rights, not to punish thievery. *See Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 92 S.E.2d 359, 365 (1956) (good faith is not defense to conversion); *Talley v. Drumheller*, 135 Va. 186, 115 S.E. 517, 518 (1923) (manner in which defendant acquires possession is immaterial in detinue). Thus, the Double Jeopardy Clause is inapplicable here because the Law Firm has not been put in jeopardy even once, let alone twice.

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[11] *See Department of Revenue v. Kurth Ranch*, —— U.S. ——, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (holding that Montana's marijuana tax assessed after criminal sanctions violates Double Jeopardy); *Austin v. United States*, —— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (holding that civil forfeiture that constitutes punishment is subject to Excessive Fines Clause); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (holding that civil sanction constitutes punishment for double jeopardy purposes if it serves retributive or deterrent, rather than remedial, purposes).

The Law Firm argues further that, even if Double Jeopardy is not strictly applicable, it is wrong to allow the government two bites at its apple, especially when the government could not force a criminal defendant to defend himself against a second action. But this argument also fails because there is no "one bite of apple" rule. The government is not prevented from taking a second bite unless some rule of law, such as *res judicata* or double jeopardy, prevents it. None does so here.

In a similar vein, the Law Firm argues that § 853's legislative history requires criminal forfeiture to be used only as an "alternative" to civil forfeiture. *See* S.Rep. No. 98-225, *reprinted in* 1984 U.S.C.C.A.N. at 3379-80. This argument has already been persuasively rejected. Congress intended § 853 to be a "concurrently available alternative" to civil forfeiture, rather than a "mutually exclusive" one. *See United States v. Dunn*, 802 F.2d 646, 647-48 (2d Cir.1986), *cert. denied*, 480 U.S. 931, 107 S.Ct. 1568, 94 L.Ed.2d 760 (1987). Thus, unless double jeopardy results, the government may pursue both criminal and civil forfeiture against the same property. Similarly, the government is not precluded from bringing a detinue or conversion action to recover the $103,800 merely because it previously sought to recover the same money in a § 853 proceeding.

IV.

The Law Firm next argues that the government has not established the required elements of a detinue [12] or a conversion [13] claim. Each cause of action is treated separately.

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[12] Detinue is nearly identical to the action of replevin. *See* 66 *Am.Jur.2d Replevin* § 5 (1973).

[13] Conversion is closely related to the actions of trover and trespass. *See* 18 *Am.Jur.2d* Conversion § 1 (1985). For a helpful discussion of the distinctions among, and varied historical origins of, the actions of replevin, detinue, trover, and conversion, see *Williams Management Enterprises, Inc. v. Buonauro*, 489 So.2d 160, 161 n. 1 (Fla.Dist.Ct.App.1986).

A.

To recover in detinue under Virginia law, the plaintiff must establish (1) that plaintiff has a property interest in the thing sought to be recovered, (2) that plaintiff has the right to immediate possession of the property, (3) that the property is capable of identification, (4) that the property is of some value, and (5) that defendant had possession at some time prior to the institution of the detinue action. *York v. Jones,* 717 F.Supp. 421, 427 (E.D.Va.1989); *Vicars v. Atlantic Discount Co.,* 205 Va. 934, 140 S.E.2d 667, 670 (1965). The first, second, and fifth of these elements are in dispute here. In particular, the question is *when* these requirements must be met. Must the government establish that it had a property interest in and right to immediate possession of the $103,800 in August 1991, when the Law Firm accepted Covington's money, or in October 1994, when the government filed its detinue complaint? Similarly, while it is beyond question that the Law Firm once possessed the $103,800, must the government also prove that the Law Firm still possessed the money in October 1994 when the instant suit was filed?

Answers to these questions follow logically from the nature of a detinue action. Detinue is "a possessory action having for its object the recovery of specific personal property." *MacPherson v. Green,* 197 Va. 27, 87 S.E.2d 785, 789 (1955); *Sinclair v. Young,* 100 Va. 284, 40 S.E. 907, 908 (1902); 66 *Am.Jur.2d Replevin* § 160 (1973). Thus, the crux of a detinue action is that a defendant currently possesses property that rightly belongs in a plaintiff's hands. Accordingly, it is immaterial what happened before the action commenced, that is, it does not matter how and when defendant obtained the property, or whether plaintiff then had a right or interest in it. *See Talley v. Drumheller,* 135 Va. 186, 115 S.E. 517, 518 (1923). Rather, plaintiff must have an interest in, and right to immediate possession of, the property at the time

the action commences. *Henderson v. Foster,* 139 Va. 543, 124 S.E. 463, 469 (Va. 1924); 26A *C.J.S. Detinue* § 5 (1956). In the case at bar, it is beyond dispute that the government had title and right to immediate possession of the $103,800 on October 21, 1994, the date it instituted its detinue action. By virtue of the February 1993 forfeiture order, the government obtained "[a]ll right, title, and interest" in the money. 21 U.S.C. § 853(c).

It also follows logically from the nature of a detinue action that the defendant must have possession of the disputed property at the time the action commences. *Austin's Executor v. Jones,* 21 Va. (Gilmer) 341, 348 (1821); *Burnley v. Lambert,* 1 Va. (1 Wash.) 308, 312 (1794); 66 *Am.Jur.2d Replevin* § 164; 26A *C.J.S. Detinue* § 7. Further, money is treated in detinue as a specific chattel, that is, it is not fungible and interchangeable. *See, e.g., Commonwealth v. Dean,* 245 Pa.Super. 322, 369 A.2d 423 (1976); *Bob White Chevrolet, Inc. v. Hayles,* 44 Ala.App. 411, 211 So.2d 157, 159 (1968); 66 *Am.Jur.2d Replevin* § 13.[14] Thus, the general rule in Virginia and elsewhere is that a detinue action is defeated if defendant spent or transferred the money in question *prior* to commencement of the action.[15] There is one ex-

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[14] The Court's previous determination that money is not fungible under 21 U.S.C. § 853 is irrelevant to the instant question. *See Moffitt II,* 864 F.Supp. at 536-39. Even though money is not fungible under § 853, it is treated as fungible in some contexts. *See id.* at 539 n. 33. Detinue, like § 853, is simply not one of those contexts.

[15] Thus, it is misleading to suggest, as some prior cases have, that detinue lies where defendant had possession "at some time prior to" commencement of the action. *York,* 717 F.Supp. at 427; *Vicars,* 140 S.E.2d at 670. Rather, plaintiff's showing that defendant once had possession merely shifts the burden of proof to defendant, who may defeat the action if he proves that he no longer possesses the property. *Lynch v. Thomas,* 30 Va. (3 Leigh) 682,

ception to this rule, which provides that a detinue action is not defeated by transfers that are wrongful, evasive, or in bad faith.[16] But for this exception, "plaintiff might by contrivance be kept in a perpetual round of suits without effect," since every defendant could evade an impending detinue action by transferring the property just before the plaintiff reached the courthouse to file a suit. *Burnley*, 1 Va. at 312.

By the time the government commenced its detinue action in October 1994, the Law Firm had dissipated all but $3,695 of the $103,800. *See Moffitt II*, 864 F.Supp. at 531. Forfeiture of the $3,695 has already been ordered, and so the government's detinue claim is moot with respect to it. As to the remainder of the $103,800, all record facts indicate that the Law Firm's dissipation of the money was in good faith and in the ordinary course of business. *Moffitt III*, 875 F.Supp. at 1156, 1166. In sum, because the Law Firm spent the bulk of the $103,800 before it was sued, the government's detinue claim must be dismissed.

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694 (1832); *Austin's Executor*, 21 Va. at 351-52; *Burnley*, 1 Va. at 312; 6A *Michie's Jurisprudence of Virginia & West Virginia Detinue & Replevin* § 8 (1991).

Note, however, that a detinue action is not defeated if defendant destroys or dissipates the property *after* the suit commences. Plaintiff may still recover in detinue for the value of the chattel on the date of the verdict. *Broad Street Auto Sales, Inc. v. Baxter*, 230 Va. 1, 334 S.E.2d 293, 294 (1985).

[16] The clear modern consensus is that defendant is not liable in detinue if he transfers the property in good faith before the action commences, regardless of whether the transfer occurs by operation of law or is a voluntary one. *See* 66 *Am.Jur.2d Replevin* §§ 27, 164; 26A *C.J.S. Detinue* § 7(c)(2). The Virginia cases on this point, none of which are recent ones, suggest that defendant must have been "divested by due course of law" or "legally evicted" to defeat the detinue claim. *See Lynch*, 30 Va. at 694; *Burnley*, 1 Va. at 312. Yet, the rationale expressed in these cases supports the general modern rule, for the Virginia courts' concern was with transfers made with an eye toward evading an impending detinue

B.

The government's second, alternative cause of action is conversion. Under Virginia law, conversion occurs when (i) plaintiff has a right to immediate possession of property,[17] and (ii) defendant wrongfully exercises or assumes authority over the property, depriving plaintiff of possession. *McCormick v. AT & T Technologies*, 934 F.2d 531, 535 (4th Cir.1991) (applying Virginia law); *Bader v. Central Fidelity Bank*, 245 Va. 286, 427 S.E.2d 184, 186 (1993). As in detinue, the initial issue here is one of timing: when must the plaintiff have the right to immediate possession of the converted property? Conversion is an action sounding in tort for damages arising from the wrongful seizure of property. *Buckeye National Bank v. Huff & Cook*, 114 Va. 1, 75 S.E. 769, 772 (1912). The gist of conversion is that plaintiff's property is injured by a wrongful act of the defendant. Thus, the key point in time is the moment when the wrongful act or conversion occurs. *Austin's Executor*, 21 Va. at 348-49 (holding that "the time of the conversion gives the date to which the action relates"). At the moment of the alleged conversion, the plaintiff must have a right to immediate possession of the property that is converted. *Harvey v. Epes*, 53 Va. (12 Gratt.) 153, 166 (1855); 18 *Am.Jur.2d Conversion* §§ 2, 75-77; 89 *C.J.S. Trover & Conversion* §§ 72-73 (1955).

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suit. *Burnley*, 1 Va. at 312. Thus, it appears that Virginia courts today would treat the Law Firm's good faith dissipation of the $103,800 as relieving it of liability in detinue, even though the dissipation did not occur by operation of law.

[17] Virginia cases on this point suggest that plaintiff must have both (i) a "property interest" in the subject of the action, and (ii) a right to immediate possession of it. *United Leasing Corp. v. Thrift Insurance Corp.*, 247 Va. 299, 440 S.E.2d 902, 906 (1994); *White v. Bonney*, 110 Va. 864, 68 S.E. 273, 273 (1910); *Harvey v. Epes*, 53 Va. (12 Gratt.) 153, 166 (1855). It is unclear what the former requirement adds to the latter, and the clear modern rule is that a right to immediate possession is alone a sufficient interest to support a conversion action. *See* 18 *Am.Jur.2d Conversion* § 76.

The difficult question presented is therefore whether the government had a right to immediate possession of the $103,800 in August 1991, when the Law Firm converted the money to its use. The government presents two arguments, each based on federal forfeiture statutes, that it had a right to immediate possession of the money at that time.

1.

First, the government contends that it had a right to immediate possession of the $103,800 in August 1991, the time of the alleged conversion, by virtue of the "relation back" provision in § 853(c). This section provides that "[a]ll right, title, and interest" in property subject to forfeiture "vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. § 853(c). Thus, the government contends that it obtained title to the $103,800 under the February 1993 forfeiture order, that this title relates back to the time of Covington's criminal activities, and that it therefore had a right to possession of the $103,800 in August 1991 when the Law Firm received the funds.

The relation back fiction originated in the common law of *in rem* forfeiture, and has been expressly enacted in several federal forfeiture statutes, including § 853. The Supreme Court recently discussed the operation of the relation back provision in another statute, 21 U.S.C. § 881, in *United States v. 92 Buena Vista Avenue*, —— U.S. ——, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993). *Buena Vista* stands for the propositions (i) that the United States cannot profit from the relation back doctrine unless and until it obtains a forfeiture order, but (ii) that when a forfeiture order enters, the United States obtains title relating back to the moment of the criminal activity. —— U.S. at ——, 113 S.Ct. at 1135-37 (Stevens, J., plurality); *id.* at ——, 113 S.Ct. at 1138-39 (Scalia, J., concurring in judgment).[18] In other words, *Buena Vista*

[18] Cases decided since *Buena Vista* accurately characterize its holding that the government does not obtain title until there is a

indicates that the Law Firm could properly claim *in August 1991* that it owned the $103,800. No forfeiture order had been entered with respect to the money, and the United States therefore had no interest in it. Yet, *Buena Vista* indicates that the government may properly claim *today* that it owned the $103,800 in *August 1991*. A forfeiture order was entered in February 1993, giving the government title to the money retroactive to the time of Covington's drug trafficking activities.

Yet *Buena Vista* does not entirely resolve the question presented here, namely, whether the government had a right to immediate possession of the $103,800 in August 1991. The Law Firm argues that a conversion must occur at one real point in time. If plaintiff's right to possession does not exist on the date of the alleged conversion, the cause of action cannot retroactively spring into being because of legal fictions and subsequent events. By contrast, the government argues that its retroactive title under § 853(c) is not so limited in effect. Where, as here, a forfeiture order has entered, the United States must be treated as if it has owned the property since the underlying crimes were committed. And this is true, the government argues, in all contexts, including a conversion action.

The statutory language supports the government's view. The statute simply provides for retroactive title, and does not limit the purposes for which the title is effective. *See* 21 U.S.C. § 853(c). It is clear that Congress included the relation back provision in § 853(c) with one particular purpose in mind, namely "to permit the voiding of certain pre-conviction transfers" that otherwise might defeat forfeiture. S.Rep. No. 98-225, 98th Cong., 2d Sess. 200, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3383. Yet,

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decree of forfeiture, but then has title effective from the date of the criminal activity. *See United States v. One Parcel of Land in Name of Mikell*, 33 F.3d 11, 12 (5th Cir.1994); *United States v. Real Property Located at 41741 National Trails Way*, 989 F.2d 1089, 1091 (9th Cir.1993).

Congress chose to enact a provision whose effect goes beyond that discrete purpose. In sum, there is no indication in § 853 that the United States' retroactive title does not apply in the context of a conversion action. The statute's plain language compels the conclusion that it does.

Support for this conclusion may also be found in the cases in which retroactive title under § 853(c) has been given effect for a variety of purposes. For example, once a forfeiture order has entered, the United States must be treated as having owned the property since the commission of the underlying crimes, and therefore is immune from state property taxes accruing during the period of retroactive ownership. *See United States v. Real Property Known as 9901 Gladiolus Drive*, 837 F.Supp. 1162, 1166-67 (M.D.Fla.1993). Similarly, the Second Circuit recently implied that, after a forfeiture decree has entered, the government can rely on its retroactive ownership of electronically-transferred funds to justify their seizure, even though the interception of the funds would otherwise violate the Electronic Communications Privacy Act. *See United States v. Daccarett*, 6 F.3d 37, 53-54 (2d Cir. 1993) (holding that government could not properly claim it had retroactive ownership where no forfeiture order had yet been entered), *cert. denied*, —— U.S. ——, 114 S.Ct. 1294, 127 L.Ed.2d 648 (1994).

The general rule that the government's title under § 853 (c) is to be given retroactive effect does not apply in certain limited situations not presented here. First, as the Supreme Court recognized in *Buena Vista*, the government does not obtain retroactive title until a forfeiture order is entered. Thus, it follows by simple logic that the government does not yet have retroactive title while it is still in the course of proceedings to obtain a forfeiture order. *See Buena Vista*, —— U.S. at ——, 113 S.Ct. at 1137-38 (government may not claim it has retroactive title to defeat "innocent owner" defense to entry of for-

feiture order).[19] Second, the government's acquisition of retroactive title cannot alter rights and obligations that have already become fixed and unchangeable before the forfeiture order is entered. For example, the Second Circuit has held that an insurance policyholder cannot be retroactively divested of her insurable interest by the relation back rule, because New York law provides that "the rights under a fire insurance policy are fixed both as to amount and standing to recover at the time of the fire loss." *Counihan v. Allstate Insurance Co.*, 25 F.3d 109, 111 (2d Cir.1994) (quoting *Whitestone S & L Assoc. v. Allstate Insurance Co.*, 28 N.Y.2d 332, 321 (N.Y.S.2d 862, 270 N.E.2d 694 (1971)).

The Law Firm contends that in the instant case, like *Counihan*, the rights and obligations of parties under Virginia's common law with respect to conversion are unalterably fixed as of the date of the alleged conversion. Yet, no Virginia or other authority is cited for the proposition that a cause of action for conversion cannot arise retroactively by operation of the relation back doctrine of federal forfeiture law.[20] Nor does the Law Firm present

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[19] *See also United States v. One Parcel of Land in Name of Mikell*, 33 F.3d 11, 13 (5th Cir.1994) (where statute requires notice to "owner" of property prior to entry of forfeiture order, property's "owner" must be identified without regard to retroactive title); *United States v. Real Property Located at 41741 National Trails Way*, 989 F.2d 1089, 1091-92 (9th Cir.1993) (government's retroactive title does not defeat attorney's lien for fees incurred in defending against forfeiture).

[20] The Law Firm does cite the Ninth Circuit's decision under California law that a conversion action cannot be created retroactively by the equitable remedy of a constructive trust. *CHoPP Computer Corp. v. United States*, 5 F.3d 1344, 1347-49 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 115 S.Ct. 63, 130 L.Ed.2d 20 (1994). There, CHoPP won a civil judgment and obtained a constructive trust on certain funds, a portion of which funds the United States had previously seized pursuant to a tax levy. CHoPP brought an action against the United States, alleging that the tax levy was a conversion. CHoPP argued that it had a right to posses-

a persuasive reason in policy or principle why conversion is a peculiar area where the general rule of retroactivity should not apply. It merely asserts, without authority, that an act cannot retroactively become a tort. While the idea of a lawful transaction retroactively becoming a wrongful taking is counterintuitive, the relation back rule is a legal fiction whose effect is counterintuitive in every instance.[21] In sum, the statutory language and prior cases establish the general rule that the government's title under § 853(c) is to have retroactive effect, and that general rule is applicable here. As a result, the government, in retrospect, had title to, and a right to immediate possession of, the $103,800 in August 1991, the time of the alleged conversion.

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sion of the funds at the time of the levy because California law provides that a constructive trust relates back to the moment a wrongful taking occurs. *Id.* at 1348. On these facts, the Ninth Circuit held that CHoPP's constructive trust could not retroactively defeat the United States' tax levy. Yet, the court's reasoning clearly reveals that the retroactive effect of a constructive trust in California law differs greatly from the retroactive effect of a forfeiture order in federal law. The *CHoPP* court reasoned that if a constructive trust could retroactively defeat "a prior and otherwise legal levy," then one creditor would be able to "deter competitors from statisfying their judgments against a common debtor." *Id.* This was not the purpose for the retroactivity of California's constructive trusts. By contrast, it is clear that § 853 forfeiture orders are retroactive precisely so that they may defeat prior and otherwise legal transfers of forfeitable property. Congress fully intended to deter transferees from knowingly accepting such property. *See* 21 U.S.C. § 853(c); *United States v. Reckmeyer*, 836 F.2d 200, 203 (4th Cir.1987); S.Rep. No. 98-225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3383. In sum, the United States' retroactive title, if applied here, serves a purpose closely related to that for which it was intended.

[21] For example, it is beyond dispute that a lawful, completed sale of property can retroactively become void by operation of the relation back provision of § 853(c). This result is no more counterintuitive than the retroactive creation of a cause of action for conversion.

2.

As an alternative theory, the government asserts that it had a right to immediate possession of the $103,800 in August 1991 by virtue of 21 U.S.C. § 881(b)(4), which allows the government to seize property without a warrant or other judicial process when "the Attorney General has probable cause to believe that the property is subject to civil forfeiture." This, too, is a sound theory. The plain language of § 881(b)(4) indicates that the government had the authority to seize the $103,800 as soon as it had probable cause to demand its forfeiture. It appears that the government had probable cause to seize all of Covington's cash at the time he paid the Law Firm's fees in August 1991. In fact, by that time, the government had already seized all of Covington's money it could locate, and the record strongly supports the conclusion that the government had probable cause to do so. First, in July 1991, a government agent submitted an affidavit to a federal magistrate judge, attesting that Covington had accumulated substantial amounts of money from drug trafficking and was believed to be actively attempting to conceal the money. The magistrate judge found probable cause to issue search and seizure warrants relating to Covington's property. Second, in October 1991, the grand jury indicted Covington and found probable cause for the inclusion of a forfeiture count based on the government's belief that $168,000 of Covington's illegitimate funds remained to be found. The government therefore had a right to seize the $103,800 in August 1991, although it was then unaware of the money's location.[22]

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[22] It is true that the government did not actually exercise its right to seize the $103,800 under § 881(b). Yet, analogously, the Fourth Circuit has held that a warrantless search of a car may be justified by the government's right to seize the car pursuant to § 881(b), even if that right is not immediately exercised. *United States v. Bizzell*, 19 F.3d 1524, 1526-27 (4th Cir.1994); *United States v. $29,000—United States Currency*, 745 F.2d 853, 855-56 (4th Cir.1984).

The Law Firm attacks the government's theory on several grounds, but none is ultimately persuasive. First, it argues that "seizure" under § 881(b)(4) does not constitute "possession." According to the Law Firm, the government does not obtain "posession" of seized property until it is successful in the ensuing forfeiture proceeding.[23] Yet, in ordinary language, to "seize" property means to obtain possession of it.[24] Moreover, the Fourth Circuit has specifically held that § 881(b) "provides methods by which the United States may obtain possession of" property. *United States v. Kemp*, 690 F.2d 397, 400 (4th Cir. 1982).[25] By seizing property pursuant to the statute, the United States "assert[s] its right to immediate possession." *Id.* at 401. It is thus clear that the government's right to seize the $103,800 entailed a right to immediate possession of the money.

In a related vein, the Law Firm also argues that a conversion plaintiff's right to immediate possession of the property must be absolute and unconditional. While Virginia courts have never stated this rule, courts in several states have held that conversion lies only where plaintiff's right to immediate possession is "absolute and unconditional." *See, e.g., Gilbert v. Rafael*, 181 Ga.App. 460, 352 S.E.2d 641, 641 (1987); *Jones v. Brown*, 108 Ga. App. 776, 134 S.E.2d 440, 444 (1963); *Hoffman v. All-*

[23] The statute requires the government to initiate forfeiture proceedings promptly after seizing forfeitable property without a warrant. 21 U.S.C. § 881(b).

[24] For example, *Black's Law Dictionary* defines "seizure" as "[t]he act of taking possession of property." *Black's Law Dictionary* 1219 (5th ed. 1979).

[25] *Kemp* involved a previous version of § 881(b)(4), which provided for seizure of property which was "used or is intended to be used" in violation of federal drug laws. 690 F.2d at 400 n. 3. Section 881(b)(4) was amended to its present form in 1984, a change that was technical and conforming rather than substantive. S.Rep. 98-225, 98th Cong., 2d Sess. 214-15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3397-98.

state Insurance Co., 85 Ill.App.3d 631, 40 Ill.Dec. 925, 927, 407 N.E.2d 156, 158 (1980); *Hobson's Truck Sales, Inc. v. Carroll Trucking, Inc.*, 2 Ill.App.3d 978, 276 N.E. 2d 89, 91 (1971). Yet, even if this were the rule in Virginia, the Law Firm's argument misapprehends the "absolute and unconditional" requirement. It is the plaintiff's right to possession that must be absolute and unconditional. In other words, it must not be contingent on events that are uncertain or have not yet occurred.[26] But there is no requirement that plaintiff must have an absolute and unconditional right to continue possession of the property indefinitely. It is well established that conversion may occur where plaintiff has an immediate, though temporary, right to possession.[27] Thus, the government had an absolute and unconditional right to immediate seizure and possession of the $103,800 in August 1991 pursuant to § 881(b), even though its right to maintain possession was contingent on its success in a subsequent forfeiture proceeding.

In summary, although the government's detinue claim fails, the requisite elements of a conversion action are present here. The government has established that it had a right to immediate possession of the $103,800 in August 1991, the time of the alleged conversion, both by the retroactive § 853 forfeiture order and by its seizure power under § 881(b).

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[26] *See Gilbert*, 352 S.E.2d at 641 (right to immediate possession must be "absolute, unconditional, and exist at the time the action is commenced"); *Jones*, 134 S.E.2d at 444 (same); *Hobson's Truck Sales*, 276 N.E.2d at 91 (plaintiff's right to immediate possession must be "absolute and unconditional and not dependent upon some act to be performed"); 18 *Am.Jur.2d Conversion* § 76 ("[T]he right to maintain the action may not be based upon a right to possession at a future time . . . .").

[27] *See* 18 *Am.Jur2d Conversion* § 75 ("Absolute and unqualified title is sufficient, but it is not required; a special, qualified, limited title, or a temporary interest, is sufficient . . . . Indeed, a mere right of possession is generally regarded as an interest sufficient to maintain the action.") (footnotes omitted).

V.

Preemption is the Law Firm's final ground for dismissal.[28] The Law Firm claims that the government's detinue and conversion claims are preempted by federal forfeiture law, specifically § 853 or § 881(b) of Title 21.[29] The Law Firm contends that these statutes preempt Virginia's common law in the circumstances of this case. Each statute is treated separately.

A.

A federal statute preempts state law if (i) Congress expressed an intent that the federal statute supplant state law, (ii) Congress implied such an intent by regulating so pervasively as to leave no room for state regulation in the field, or (iii) state law actually conflicts with federal law, that is, it "stands as an obstacle to the accomplishment of the full purposes and objectives" of a federal statute. *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-75, 110 L.Ed.2d 65 (1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1412-13 (4th Cir.1994)).[30] The Law Firm relies on the third of these alternative grounds for preemption.

It is important to note initially that the question presented here is not whether federal forfeiture law *generally*

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[28] The Court considers the Law Firm's preemption argument as a ground for dismissal of the government's conversion claim, and as an alternative ground for dismissal of the government's detinue claim.

[29] For its detinue claim, the government's right to possession of the $103,800 is derived from the § 853 forfeiture order entered in February 1993. For its conversion claim, the government's right to possession is derived from § 853's relation back provision or, alternatively, from § 881's seizure powers.

[30] An actual conflict between state and federal law also exists where, unlike here, it is impossible for a private party to comply with both. *See English*, 496 U.S. at 79, 110 S.Ct. at 2275.

preempts Virginia's detinue and conversion law. It plainly does not. For example, § 853 would not preempt a detinue or conversion action against the Law Firm by a party other than the government, such as a suit by another law firm claiming it was promised a share of the fees paid by Covington. Likewise, if the government brought a detinue or conversion action against the Law Firm that did not rely on § 853 or another portion of federal forfeiture law, the action would not be preempted. These actions, because they are entirely independent of § 853, would not conflict with the purposes and objectives of the § 853 forfeiture scheme.[31] Rather, the question presented here is whether the government may properly pursue a state-law detinue or conversion action when its sole interest or right in the allegedly detained or converted property is derived from federal forfeiture law, specifically § 853.

The parties each suggest that the preemption question turns on one's view of why Congress enacted a substitute assets provision that pertains only to defendants and not to third parties. The government sees this as an inadvertent "hole" in the statute, which can be creatively and judicially repaired in the name of serving the statute's purpose of furthering the war on drugs. By contrast, the Law Firm sees the omission of a substitute assets provision applicable to third parties as a deliberate, thoughtful action by Congress to protect such parties under the statute. Neither position is appealing. The government's position is flawed because it asks too much of the judicial process. While judges certainly must interpret statutes, it is not the office of the judiciary to mend allegedly defective statutes. Legislatures fix statutes; courts interpret them. If the government's position asks too much of the judicial process, the Law Firm's position does the same

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[31] Similarly, Virginia forfeiture laws are clearly not preempted by § 853. *See, e.g.*, Va.Code §§ 19.2-368.19 to 19.2-368.22, 19.2-386.1 to 19.2-368.13 (criminal forfeiture provisions).

with respect to the legislative process. While Congress on some occasions acts thoughtfully and deliberately, it certainly does not always do so. In this event, the reason Congress omitted a substitute assets provision applicable to third parties is unknown (and likely unknowable). In any event, it is unnecessary to speculate concerning what may have been in Congress's "mind" in omitting a third-party substitute assets provision because the detinue and conversion claims at bar are an improper supplement to the § 853 forfeiture provisions. It is enough, on this issue, to examine § 853, which examination plainly discloses that Congress has created a comprehensive criminal forfeiture scheme that contains provisions explaining in detail what property the government may obtain by way of forfeiture. The statute prescribes the forfeiture of some property, and proscribes the forfeiture of other, thereby describing completely and exclusively all the property Congress meant to be recovered by virtue of a § 853 forfeiture order. Where, as here, the government seeks to augment its § 853 forfeiture capabilities by resorting to state-law actions to reach property it could not obtain under § 853, it is plain that the government's use of state law "stands as an obstacle to the accomplishment of the full purposes and objectives" of Congress's carefully crafted forfeiture scheme. *Silkwood*, 464 U.S. at 248, 104 S.Ct. at 621. It follows, in these circumstances, that § 853 must preempt state conversion and detinue law.[32]

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[32] This conclusion, the government argues, leads to results that could not have been intended by Congress. Suppose, the government suggests, Covington had sought to avoid forfeiture of the $103,800 by giving it to a person who knew the money was derived from drug trafficking and was therefore subject to forfeiture. The government asks the Court to suppose further that the person spent the money before authorities secured an order forfeiting the money. In this event, the government finds it hard to believe that Congress did not intend for the person who received and spent the money to be liable to the government for $103,800. The fatal flaw in this argument is that § 853(p), the substitute assets provi-

The government concedes, as it must, that the action at bar is designed to circumvent the fact that § 853 does not require third parties to forfeit substitute assets. To permit this circumvention cold lead to troubling results. Were the government allowed to circumvent this aspect of § 853, then it might well attempt to use detinue or conversion actions to circumvent other aspects of the statute, such as § 853's protection of bona fied purchasers "reasonably without cause to believe" the property is subject to forfeiture. 21 U.S.C. § 853(c).[33] Such a circumvention would plainly be an obstable to the accomplishment of § 853's purposes and objectives. Similary, allowing state detinue or conversion claims to be used to augment § 853 forfeiture would allow the government to sidestep limitations on forfeiture by criminal defendants.

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sion, does not, by its terms, extend to third parties. Had Congress intended otherwise, it could and should have crafted § 853(p) to accomplish this purpose. *See Moffitt II*, 864 F.Supp. at 535-36.

[33] This is possible because a third party can raise § 853's bona fide purchaser defense only *after* a forfeiture order is entered. 21 U.S.C. § 853(n). And once the forfeiture order enters, the government might proceed to the state or federal courthouse, forfeiture order in hand, and file an action in detinue or conversion against the bona fide purchaser. And under Virginia law, a bona fide purchaser may be held liable in detinue or conversion even though he was entirely without reason to know he was accepting tainted property. *See Universal C.I.T.*, 92 S.E.2d at 365; *Talley*, 115 S.E. at 518; *supra* at p. 1197.

The government's response to this scenario is that the bona fide purchaser can always file a § 853(n) petition with the court that ordered the forfeiture. If the petition is successful, the forfeiture order will be amended so that it no longer covers the purchaser's property. *See Buena Vista*, —— U.S. at ——, 113 S.Ct. at 1141 (Scalia, J., concurring in judgment). As amended, the forfeiture order will no longer support the government's detinue or conversion claims. But there is surely an additional reason the government may not use a detinue or conversion action to circumvent § 853's bona fide purchaser protection, namely that Congress did not intend for the government to obtain § 853 forfeiture orders and then opt out of § 853's comprehensive forfeiture scheme in favor of more liberal recovery through state-law actions.

For example, § 853(p) requires defendants to forfeit "substitute" property in some, but not all, circumstances. It applies only when the tainted property becomes unavailable "as a result of any act or omission of the defendant." 21 U.S.C. § 853(p). If, for example, a criminal's drug profits were destroyed in a tornado, or stolen from his home in a burglary, the government could not recover substitute assets from him under § 853(p). Yet, unless preempted by § 853, the government could file a state-law detinue or conversion action and effectively achieve forfeiture of substitute property in these circumstances. Just as § 853 must preempt state-law actions that circumvent its scheme in the manner of these examples, so, too, must it preempt the government's actions in the case at bar.

Section 853(k) also supports the conclusion that the government may not resort to state conversion and detinue actions to circumvent § 853's comprehensive scheme. It provides that a third party such as the Law Firm cannot intervene in the criminal proceeding or commence a civil action concerning the validity of its interest in the property. 21 U.S.C. § 853(k). Thus, a § 853(n) petition is the sole means by which such a party may assert its interest in property threatened with § 853 forfeiture. In other words, § 853(k) preempts state-law actions against the government, including actions in detinue and conversion, by third parties who wish to bypass § 853(n)'s procedures. This provision reinforces the conclusion that the § 853 proceeding is meant to be the exclusive avenue for determining what property the government can recover by virtue of a § 853 forfeiture order.

This conclusion finds further support in the clear principles that emerge from cases that have considered the extent to which federal forfeiture laws preempt state property law. Federal forfeiture statutes generally rely on state law to define property rights and interests. For example, state law determines who is the owner of a particular

item of property.[84] But once property interests are defined by state law, the federal forfeiture statutes alone control whether those property interests must be forfeited to the government. Thus, where a federal statute provides for forfeiture of a house used for an illegal gambling operation, the federal statute preempts a state's "homestead exemption" that appears to preclude forfeiture of the house. *United States v. One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1497-98 (11th Cir. 1994). Just as a party cannot use state law to *prevent* a forfeiture provided for by federal law, so, too, is the government precluded from using state law to *achieve* a forfeiture that federal law does not permit. In either case, federal forfeiture law preempts a state law that would effectively change the scope of federal forfeiture. Were the government's detinue or conversion action to succeed here, the government would recover property by virtue of a § 853 forfeiture order whether or not the property is not properly subject to forfeiture under § 853. State law is therefore preempted.

The government cites a number of cases for the proposition that private, state-law damages actions are generally not preempted even though comprehensive federal schemes regulate the same field. *Cipollone v. Liggett Group*, —— U.S. ——, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990); *Silkwood v. Kerr-McGee*

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[84] For example, several courts have found that federal civil forfeiture statutes rely on state law to define an innocent owner's interest in property, and therefore do not preempt state law regarding the incidents of ownership in tenancy by the entireties. *See United States v. 35 Acres, More or Less, in Cherokee County*, 1991 WL 154348, No. 90-7376 (4th Cir. Aug. 15, 1991) (North Carolina law) (unpublished); *United States v. Certain Real Property Located at 2525 Leroy Lane*, 910 F.2d 343, 347 (6th Cir.1990) (Michigan law), *cert. denied*, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991); *United States v. One Single Family Residence With Out Buildings Located at 15621 S.W. 209th Avenue*, 894 F.2d 1511, 1517-19 (11th Cir.1990) (Florida law).

Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Yet, these cases are inapposite for two reasons. First, the Law Firm does not contend that § 853 or any other federal forfeiture statute occupies its field to the complete exclusion of state law. Rather, it correctly argues that the government's use of state law to bypass a troublesome portion of § 853's forfeiture scheme "stands as an obstacle to the accomplishment of the full purposes and objectives" of the statute. *Silkwood*, 464 U.S. at 248, 104 S.Ct. at 621; *see supra* at p. 1203. Second, the cited cases do not stand for the proposition the government claims. In each case, the Supreme Court held that Congress intended for the federal scheme in question to preempt state law to some extent, but that some or all of the plaintiff's state-law claims were outside the scope of the preemption.[85] By contrast, the government's detinue and conversion claims here are plainly within the scope of § 853's preemption.

Finally, the government points to 21 U.S.C. § 903, which provides that § 853 shall not be construed as indictating Congress' intent to occupy its field to the exclusion of state law, unless there is a "positive conflict" between the federal scheme and the state law, "so that the

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[85] For example, the Court held that federal statutes fully occupy the field of nuclear safety regulation, but that they do not thereby preempt state-law tort claims against nuclear facilities. *See English*, 496 U.S. at 80-85, 110 S.Ct. at 2275-78; *Silkwood*, 464 U.S. at 249-56, 104 S.Ct. at 621-25. Similarly, in *Cipollone*, the Court held that the express preemption provision in the Public Health Cigarette Smoking Act of 1969 preempts a state-law tort claim that cigarette advertising failed to warn of smoking's hazards, but does not preempt claims based on other state-law theories, such as breach of express warranty or conspiracy. —— U.S. at ——, 112 S.Ct. at 2621-23 (plurality opinion); *see also Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.1992) (finding express preemption provision in Federal Insecticide, Fungicide and Rodenticide Act preempts state-law claims regarding labeling, but not claims relating to product design, manufacture, or testing).

two cannot consistently stand together."[36] Section 903 is irrelevant here for several reasons. First, it is important to note again that there has been no suggestion that § 853 occupies any field to the exclusion of state law. It does not preclude forfeiture actions pursuant to Virginia statute, nor does it affect detinue or conversion actions by the government or any other plaintiff whose interest in the subject property is not derived from § 853. Second, § 903 pertains only to state law "on the same subject matter" as subchapter I of Title 21, that is, drug control and enforcement. Thus, it is immaterial to the preemption of Virginia's detinue and conversion law. *See United States v. Lot 5, Fox Grove*, 23 F.3d 359, 363 n. 8 (11th Cir.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 722, 130 L.Ed.2d 627 (1995); *United States v. Stazola*, 893 F.2d 34, 38 (3d Cir.1990). And finally, even if § 903 were applicable here, it would not bar the conclusion that § 853 preempts state law in the circumstances of this case. Where, as here, the government resorts to state law seeking to use a § 853 forfeiture order to recover property that it cannot obtain under § 853, there is plainly a "positive conflict"[37] between § 853 and

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[36] Section 903 of Title 21 provides that:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

[37] The government emphasizes that § 903 requires a "positive" conflict, and contends that the alleged conflict between state law and § 853 is at best a negative one, that is, a negative implication from the fact that § 853 does not contain a substitute assets provision applicable to third parties. As stated above, § 903 is not applicable here. Moreover, the government's argument misconstrues the meaning of the word "positive" in this context, which is that the conflict must be clear, direct, and certain, not that it must be

state law such that "the two cannot consistently stand together." 21 U.S.C. § 903.

B.

It is equally clear that the government's claims are preempted by federal law if they rely on the government's seizure powers under § 881(b), rather than the § 853 forfeiture order. In essence, the government contends that it could have recovered $103,800 from the Law Firm without ever instituting a forfeiture action against Covington or the Law Firm. Specifically, the government argues that there was probable cause to believe Covington's money was subject to civil forfeiture, it had the right to seize the $103,800 from the Law Firm pursuant to § 881 (b)(4). Thus, the government's theory goes, it could have recovered $103,800 from the Law Firm by simply filing a detinue or conversion action under Virginia law at any time after the Law Firm accepted the money. Yet, Congress expressly stated that following a warrantless seizure pursuant to § 881(b), forfeiture proceedings "shall be instituted promptly." 21 U.S.C. § 881(b). This requirement clearly reflects Congress' intent that § 881(b) seizuer operate as a prelude to a forfeiture action. Moreover, if the government were able to use detinue and conversion actions in this manner, it could easily evade important provisions of federal forfeiture statutes, radically expanding its asset recovery capabilities in the process. For example, as explained earlier in this opinion, the government could effectively nullify the "bona fide purchaser" and "innocent owner" protections contained in federal forfeiture statutes. It could simply file conversion and detinue actions against every third party who accepted property that the government has probable cause to believe is forfeitable. The third parties' knowledge then

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"non-negative." *See* H.Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4566, 4629 (§ 903 requires a conflict that is "direct and positive"). It is positively clear that such a conflict is present here.

would be irrelevant to their liability. *See Universal C.I.T.*, 92 S.E.2d at 365; *Talley*, 115 S.E. at 518; *supra* at p. 1197. Thus, § 881(b) clearly preempts the government's use of state law actions such as detinue or conversion where the government's interest in the property is derived from § 881(b), and where it seeks to obtain property that cannot be obtained via forfeiture under federal law.

VI.

To summarize, the government's conversion claim fails because it is preempted by federal law, whether it relies on § 853 or § 881(b). The government's detinue claim fails for the same reason, and also because the Law Firm no longer possessed the property that was allegedly wrongfully detained, the $103,800, at the time the government commenced its action. The Law Firm's motion to dismiss must be granted, and the government's motion for summary judgment must be denied.

An appropriate order shall issue.[38]

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[38] A final order will not be issued in this matter until the completition of the forfeiture proceeding, Misc. No. 93-0006-A, at which time the two actions will be consolidated for purposes of appeal.

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

Misc. No. 93-0006-A

IN RE MOFFITT, ZWERLING & KEMLER P.C.

Jan. 19, 1995

MEMORANDUM OPINION

ELLIS, District Judge.

Like rumors of Mark Twain's death, statements that the last chapter in this saga had been written were (lamentably) premature. Statements of this sort appeared in *In re Moffitt, Zwerling & Kemler, P.C.*, 864 F.Supp. 527 (E.D.Va.1994) (hereinafter *Moffitt II*),[1] which held, *inter alia*, that 21 U.S.C. § 853 requires a party who received forfeitable property from a criminal defendant, but who then transferred or dissipated the property prior to the entry of a restraining or forfeiture order, to forfeit property traceable to the transferred property. *Id.* at 541-

[1] The issues decided in *Moffitt II* arose as a result of the earlier decision that (i) the $103,800 in cash the Law Firm received from its client, William Covington, constituted proceeds from drug trafficking activities, and (ii) the evidence did not establish that the Law Firm was reasonably without cause to believe the cash was subject to forfeiture. *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463 (E.D.Va.1994), *appeal dismissed*, No. 94-5167 (4th Cir. June 28, 1994) (hereinafter *Moffitt I*). This decision had the effect of leaving in place a February 1993 forfeiture order covering the $103,800.

42. The present chapter in this saga concerns disputes arising from the government's application for certain discovery orders in furtherance of its attempts to trace forfeitable property. Whether this is the final chapter remains to be seen.

I.[2]

In August 1991, William Covington was under investigation for drug trafficking, and sought to retain the Law Firm to represent him. The Law Firm informed Covington that it would require an initial payment of fees in the amount of $100,000. Covington was able to assemble $103,800 in cash by disinterring money he had buried to avoid its forfeiture, and by collecting on debts owed him by his drug customers. On August 23 and 24, Covington delivered the cash to the Law Firm, and the money was promptly deposited into two bank accounts. The bulk of the money, $93,800, went into the Law Firm's general operating account, the account used for ordinary business needs such as paying rent, bills, and salaries. The remaining $10,000 was deposited in the Law Firm's "omnibus" escrow account to be held on Covington's behalf and used to defray the expenses of his representation. Although this account contained funds of many different clients, the Law Firm kept separate ledgers of the amounts deposited and withdrawn for each client.

The Law Firm's bank accounts were quite active. In the months following the deposits of the $103,800, a substantial number of checks were written on the operating account, including several large ones.[3] For example, on

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[2] The history of this proceeding and a more detailed statement of facts appear in *Moffitt I* and *Moffitt II*. Only those facts necessary for context and the resolution of the questions presented are set forth here.

[3] For example, in a representative week, November 1 to November 7, 1991, the Law Firm made 21 withdrawals from, and 12 deposits to, its operating account. The withdrawals were used for various purposes including rent, answering services, long-distance

September 13, 1991, the Law Firm withdrew $50,000 to open a savings account. On September 25, the Law Firm paid out $25,000 from the savings account as a loan to one of its partners, to be repaid with interest over several years, primarily through salary deductions. In January 1992, the remainder of the money in the savings account was withdrawn and redeposited in the operating account. Most importantly, in January 1992 and again in April of that year, the general operating account "zeroed out," that is, it temporarily reached a zero or slightly negative balance. Over the same period of time, Covington's $10,000 in the escrow account was gradually spent as the Law Firm withdrew money to cover the expenses of the representation. By May 1992, although the omnibus escrow account contained substantial sums of money belonging to other clients, Covington's ledger showed only $3,695 of the original $10,000 remaining.

The government's investigation of Covington continued while the Law Firm was spending the funds received from him. It culminated in an indictment on October 30, 1991 for drug distribution and money laundering. Although the indictment contained no specific reference to the funds Covington paid the Law Firm, it did include a forfeiture count broadly covering all property derived from Covington's criminal activities. It appears that the government first received information in November 1991 about the August fee payments made by Covington. Although the government was able eventually to confirm that the Law Firm had deposited $103,800 in cash in its accounts in late August 1991, there was no conclusive evidence that this money had come from Covington. After unsuccessfully attempting to obtain such evidence, the United States

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telephone service, express mail, bookkeeping services, parking fees, group health insurance premiums, gas, electricity, federal and state tax withholding, medicare and FICA payments, and miscellaneous office expenses. The deposits constituted rent, client fees, and client reimbursements.

Attorney for the Eastern District of Virginia, in March 1992, requested authorization from the Department of Justice to seek forfeiture of $103,800 from the Law Firm. On May 12, 1992, the Department of Justice approved the request, and the government then promptly filed a bill of particulars stating that the money was subject to forfeiture pursuant to Covington's indictment. The next day, the government moved for and received a restraining order enjoining the Law Firm and its partners, William B. Moffitt, John Zwerling, and Lisa Kemler, from expending Covington's $103,800 "or any property traceable to such property."

Covington eventually pled guilty to (i) a drug conspiracy in violation of 21 U.S.C. § 846, (ii) money laundering in violation of 18 U.S.C. § 1956, and (iii) a firearms offense in violation of 18 U.S.C. § 924(c). At sentencing on February 26, 1993, the Court ordered the forfeiture of virtually all of Covington's assets, including the $103,800 he paid to the Law Firm, contingent on the rights of any third parties to be claimed pursuant to 21 U.S.C. § 853(n). The Law Firm filed such a petition contending that the forfeiture was improper because the Law Firm was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853 (n)(6)(B). Following a full evidentiary hearing, the Court denied this petition.[4] The government then proposed a final decree of forfeiture of the $103,800, which the Law Firm opposed on the ground that, with the exception of $3,695 in the escrow account, it no longer had Covington's money. After further hearings, the Court held that the government's forfeiture powers under § 853 are less extensive with regard to forfeiture by third parties, such as the Law Firm, than with regard to criminal defendants, such as Covington. More specifically, the Court ruled that § 853 does not require the Law Firm to forfeit unrelated substitute property in place of the money re-

[4] *See Moffitt I.*

ceived from Covington that was spent prior to the entry of the restraining or forfeiture order, but it does require the Law Firm to forfeit any property, held at the time such an order entered, that is derived from or traceable to Covington's money.[5]

The government is now pursuing forfeiture of traceable property from the Law Firm. On October 21, 1994, in furtherance of this effort, the government applied for an order of discovery pursuant to § 853(m).[6] By order dated November 7, the Court granted in part the government's motion for a discovery order, requiring the Law Firm to produce documents and other materials reflecting all payments from the firm's accounts in which Covington's money had been placed.[7] In response to the order, the Law Firm provided the government with bank statements of its operating and savings accounts and copies of its general ledger for the period from August 1991 to January 1992. On November 10 and 11, the government submitted eighteen additional requests for information to the Law Firm. The Law Firm responded by letter, providing some, but not all, of the requested information. At a hear-

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[5] *See Moffitt II.*

[6] Section § 853(m) provides that:

> In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

[7] On the Law Firm's motion, the Court authorized the Law Firm to redact the names of payees other than Law Firm partners, but allowed the government leave to seek to compel disclosure of particular payees' identities upon a showing of good cause.

ing on November 15, the government unsuccessfully sought permisison to obtain documents directly from the Law Firm's bank, and the parties also presented argument on a variety of unresolved discovery disputes. The Court heard further argument and received additional briefs from the parties regarding those disputes, and the disputes are now ripe for disposition.

II.

While the parties agree on very little, there seems to be common ground as to one important principle: courts are vested with considerable discretion with respect to the execution of forfeiture orders. Thus, following entry of a forfeiture order, courts may order the deposition of witness and production of documents "[i]n order to facilitate the identification and location of property declared forfeited." 21 U.S.C. § 853(m). And in this connection, the statute expressly instructs that execution of forfeiture orders shall occur "upon such terms and conditions as the court shall deem proper." 21 U.S.C. § 853(g).[8] Apart from this important, but narrow area of agreement, the parties dispute a variety of discovery issues arising from the government's efforts to trace the forfeited funds. Most fundamentally, the parties are at odds about the proper scope of tracing under § 853.

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[8] The phrase "terms and conditions" has been found to confer discretion on courts in other contexts. *See* Rule 16(d)(2), Fed.R. Crim.P. (where party fails to comply with discovery rules, court may order discovery or exclude evidence upon such "terms and conditions as are just"), *discussed in United States v. Glover*, 846 F.2d 339, 342 (6th Cir.) (decision whether to impose sanctions for violation of discovery rules is "left to the sound discretion of the trial court"), *cert. denied*, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 565 (1988); 28 U.S.C. § 2001(a) (judicial sale of realty shall be upon such "terms and conditions as are just"), *discussed in United States v. Branch Coal Corp.*, 390 F.2d 7, 10 (3d Cir.) (courts' discretion in fashioning sales will not be disturbed on appeal absent abuse), *cert. denied*, 391 U.S. 966, 88 S.Ct. 2034, 20 L.Ed.2d 878 (1968).

The Law Firm takes a very restrictive view of the government's § 853 forfeiture power. Noting that the statute's purpose is to punish criminals, the Law Firm argues that § 853(c) should not require a third party to forfeit property unless the forfeiture somehow punishes the defendant as well as the third party. The Law Firm thus contends that third-party forfeiture is appropriate where, for example, property was received in sham or fraudulent transactions.[9] But, the Law Firm argues, § 853 (c) forfeiture is improper when it constitutes punishment only of the third party and not the criminal. Since the Law Firm believes forfeiture by it will not punish Covington in any manner, it submits that it should be required to forfeit only the $3,695 remaining in the escrow account, and no other property regardless of its traceability to Covington's money.

This restrictive interpretation of § 853 is unpersuasive.[10] It must be noted that the Law Firm's argument is not uniquely applicable to forfeiture of traceable property. Had the Law Firm placed Covington's $103,800 in a safe and never disturbed it, the Law Firm could still argue now that forfeiture of the money would punish it and not Covington. Thus, the Law Firm's argument, if accepted, proves too much; it justifies narrowly limiting all § 853 (c) forfeitures, a result at odds with the terms and pur-

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[9] The Law Firm contends that limiting third-party forfeiture to sham and fraudulent transfers is proper because, in those instances, the property in the third party's hands "is *really* the property of the defendant." In fact, once the forfeiture order enters, the property is *really* the property of the government. *See* 21 U.S.C. § 853(c); *United States v. 92 Buena Vista Avenue*, —— U.S. ——, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993).

[10] The Law Firm's argument has already been rejected by the Fourth Circuit. *See In re Caplin & Drysdale*, 837 F.2d 637, 641-42 (4th Cir.1988) (en banc) (finding forfeiture by attorneys under $3.262, which Covington gave to the Law Firm prior to his sur- *& Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

pose of the statute. *See Moffitt II*, 864 F.Supp. at 544. The statute's words are the best indication of what Congress intended.[11] While legislative history suggests that Congress was concerned in part about sham or fraudulent transfers of criminal proceeds,[12] Congress included no language even arguably restricting § 853(c) to such transfers. Moreover, Congress chose to include an exception for certain bona fide purchasers. *See* 21 U.S.C. § 853 (c), (n). To read into the statute a different and even broader exemption would amount to legislation by judicial fiat.

The Law Firm's argument also takes an inappropriately myopic view of the statute's purposes. An attorney's forfeiture of fees, viewed in isolation and after the fact, always appears to punish the attorney and not the criminal. But this ignores the fact that effective third-party forfeiture laws encourage attorneys to act responsibly in accepting fees in the first place. When attorneys do so, criminals are deprived of the ability to hire legal talent with ill-gotten funds. *See In re Caplin & Drysdale,* 837 F.2d 637, 649 (4th Cir.1988) (en banc) (describing public interest in stripping criminals of undeserved economic power, including ability to hire expensive lawyers), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

The government's view of tracing under § 853 is quite different. It properly notes that the statute provides for forfeiture of traceable property held by third parties such

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[11] *See Amoco Production Co. v. Gambell,* 480 U.S. 531, 552, 107 S.Ct. 1396, 1407, 94 L.Ed.2d 542 (1987) (interpreting word "Alaska" in 16 U.S.C. § 3120 according to its familiar and precise "geographic/political meaning").

[12] *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. 209 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3392.

as the Law Firm,[13] and further authorizes discovery directed at identifying such property.[14] Given this, the government argues that it is entitled to pursue whatever discovery may be necessary to trace forfeited assets. In the government's view, failure to allow thorough discovery in the search for traceable assets would run counter to the criminal forfeiture statutes' purpose of stripping criminal offenders and organizations of their ill-gotten economic power. *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374; *Caplin & Drysdale*, 837 F.2d at 648. Although essentially sound, the government's position has important limits. The government's tracing and ancillary discovery efforts may not go wholly unbridled. They are subject to the exercise of sound judicial discretion.

III.

Before addressing the parties' particular tracing disputes, it is helpful to set forth certain general principles applicable to tracing. As the parties have found, tracing is an area in which it is difficult to navigate by precedents, for in most respects, this case raises issues not previously addressed in the case law. We are, as it were, in largely uncharted waters.

Cases addressing tracing deal almost exclusively with one topic, namely the problem of tracing money through bank accounts in which tainted and innocent funds commingle. The leading case on tracing, *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir.1986), establishes three important principles. The first is that, while the government bears the burden of proving forfeitability by a preponderance of the evidence,[15] Congress

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[13] *See* 21 U.S.C. § 853(a), (c); *Moffitt II*, 864 F.Supp. at 541-42.

[14] 21 U.S.C. § 853(m).

[15] 21 U.S.C. § 853(a), (c), (d); *see United States v. Elgersman*, 971 F.2d 690, 694-97 (11th Cir. 1992); *United States v. Simone*, 931 F.2d 1186, 1198-99 (7th Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991).

did not saddle the government with all "the risk of the inevitable uncertainty that will arise in most [tracing] cases." *Id.* at 1160. Thus, when tracing commingled funds, the government is accorded flexibility to choose among various accounting approaches. Where tainted and innocent funds commingle in an account and withdrawals are made, the government might persuasively argue that (i) the tainted money remains in the account, (ii) that the tainted money came out in one or more withdrawals, or (iii) that the tainted money is both in the account's remaining balance and in the withdrawals, in pro rata amounts. *Id.* at 1159-60.

The second principle evident in *Banco Cafetero* is that realism and substance must control the definition of traceable property. The government's choices among accounting alternatives need not be blindly accepted by courts, for "[w]hich approach reflects reality in any particular case will depend on the precise circumstances." *Id.* at 1160. For example, if $175 from an automobile insurer is deposited in a bank account one day, and a $175 check to the garage is written the next, the government cannot convincingly argue that the insurance money is still in the account. *Id.*

The third principle described in *Banco Cafetero* is known as the "lowest intermediate balance" rule. It provides that once tainted funds are withdrawn from an account, subsequent deposits of unrelated funds will not be treated as taking their place. 797 F.2d at 1159. For example, if $100 of drug money is deposited into an account, and the balance fluctuates as low as $25, but deposits of unrelated funds bring the balance up to $200 at the time of the forfeiture order, only $25 from the account is forfeited. On the other hand, if the deposits made after the account first "zeroes out" are not unrelated, that is, if the deposits constitute criminal profits or traceable money, the lowest intermediate balance rule of course does not prevent their forfeiture.

Banco Cafetero's principles may be, and indeed should be, extrapolated to issues other than commingled bank accounts. They should inform all tracing efforts. It would be inconsistent with Congress' purposes to immunize a party from forfeiture merely because its financial activities are complex. Thus, the government must be given some latitude in charting its way through a tangled web of financial transactions. But it is equally important that the government's tracing theories and accounting methods do not trump realism and common sense.[16] Often, the logic of tracing, if relentlessly pursued, can lead to a very lengthy, if not infinite, labyrinthically complex trail. Following such a trail is often neither sensible nor practical. There comes a time when two items of property, though logically connected by a long string of transactions, are too remote one from the other to justify forfeiture, and therefore cannot be termed traceable to or derived from one another.[17] In addition, overly rigid enforcement of arbitrary tracing rules invites avoidance, for if form dominates substance, persons with forfeitable property will soon learn the quickest way to launder their property of its traceable taint.

Judicial discretion must necessarily play a significant role in guiding and limiting governmental efforts to trace forfeitable assets. And the factors relevant to the exercise of judicial discretion vary from case to case. For

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[16] *See United States v. Moore*, 27 F.3d 969, 977 (4th Cir.1994) (describing the "accepted, but arbitrary, accounting techniques" of *Banco Cafetero*).

[17] Analogously, in the context of tort law, courts long ago recognized that factual or "but for" causation, taken to its logical extreme, extends legal liability too far, for "[i]n a philosophical sense, the consequences of an act go forward to eternity." Keeton, et al., *Prosser & Keeton on the Law of Torts* 264 (5th ed. 1984). Thus, under the heading of "proximate" causation, courts set boundaries on tort liability according to "some social ideal of justice or policy." *Id.* Likewise, the concept of tracing reaches much further in logic than it should in practice.

example, the Law Firm complains that the government did not expeditiously pursue the forfeiture against it, and that much of the complications here arise from the fact that the government did not request its restraining order until May 1992. While the Court previously found that this delay was due in part to the Law Firm's failure to disclose Covington's identity, *see Moffitt II*, 864 F.Supp. at 543 n. 45, that does not mean that the government acted as promptly as it might have or that the government's delay is not an equitable factor to be considered in shaping tracing here. The contrary is true, as a moment's reflection confirms. Where the government fails to act promptly in seeking forfeiture, the resulting passage of time misleadingly encourages third-party transferees to believe that the property is not subject to forfeiture and provides the opportunity for additional transfers, thereby further complicating and lengthening the tracing trail. Thus, where as here, the delay is due in part to the Law Firm's actions, but also in part to the government's procrastination, the latter factor may be weighed against the government's request to extend the tracing trail and to obtain discovery in aid of this effort.

Another factor that may weigh against the government here is its decision to remit Covington's forfeiture to some extent. Covington's plea agreement required the government to return to him certain hand tools and 50% of the net proceeds of the sale of certain equipment of his auto service business. The hand tools were mistakenly sold by the government along with the other equipment. The government realized $11,300 on the sale, minus expenses of $6,327 incurred by the United States Marshal's service, for a net recovery of $4,972. Accordingly, in April 1993, the government remitted half the balance, $2,486, to Covington. As the Law Firm argues, this remission must weigh in the Court's discretion in controlling the government's efforts to obtain forfeiture from the Law Firm. The fact that the government returned property of significant value to Covington militates against permitting the

government to resort to intrusive discovery efforts against the Law Firm in pursuit of assets of lesser value than those remitted.

One must be careful to distinguish a voluntary remission by the government, such as the $2,486 here, from the government's settlement of claims against it, however wise or mistaken the settlement may be. The government released $5,500 of seized money to Covington that is in the latter category. Covington objected to the mistaken sale of his hand tools and the high ratio of the Marshal's expenses to the amounts realized on the sale. In March 1994, the government negotiated an agreement to settle all Covington's claims in return for release of an additional $5,500 of seized money.[18] The $5,500 is not relevant to the exercise of discretion in the proceeding against the Law Firm, since it represents not a willingness to forego forfeiture, but a settlement of claims against the government.[19]

It is also important to note that there can be no forfeiture of property from anyone, including Law Firm employees, who qualifies as a "bona fide purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(c). The Law Firm pre-

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[18] This amount was apparently transferred to Covington's former wife in satisfaction of back alimony obligations. It is not relevant here what Covington did with the money. The important fact is that the $5,500 was paid to Covington in settlement of his claims against the government, and not as a voluntary remission.

[19] The Law Firm also complains that the government made inadequate efforts to locate other assets that it knew or should have known Covington possessed. It appears, though, that the government made reasonably substantial and sufficient efforts to find and forfeit Covington's illgotten property, and it should not be penalized now for its inability to defeat entirely the extensive efforts Covington undertook to conceal his assets from forfeiture.

viously failed to qualify for this protection,[20] and based on that ruling, it appears beyond question that at least some of the Law Firm's partners would fail to qualify as well. The Law Firm argues that one of its three partners, Lisa Kemler, was a bona fide purchaser of Covington's money who was reasonably without cause to believe that it was subject to forfeiture. *See* 21 U.S.C. § 853(c), (n). On that basis, it contends further that Kemler should not be subject to discovery concerning whether she holds traceable property. The government responds that (i) whether Kemler qualifies for this protection is a question to be decided if and when the government proposes an order of forfeiture that includes her property, and (ii) the possibility that she will later qualify under § 853(n) is irrelevent to the government's present discovery efforts. But where it appears likely that a person cannot be required to forfeit property because he or she qualifies for the protection of § 853(n), it surely is within a court's discretion under § 853(g) and (m) to curb discovery with respect to that person. The parties and the Court, in litigating and resolving the issues presented in *Moffitt I*, extensively considered what the Law Firm's partners knew or should have known when accepting Covington's money. Yet the government has presented no facts that suggest or show that Kemler had reason to know of the forfeitability of the $103,800. Under these circumstances, discovery with respect to Kemler's property is inappropriate. The same conclusion clearly applies to all parties other than the Law Firm and its other two partners.

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[20] The only conclusion about § 853's bona fide purchaser protection reached in this proceeding thus far is that the Law Firm itself could not prove that it was reasonably without cause to know the $103,800 was subject to forfeiture. *See Moffitt I*, 846 F.Supp. at 472-76. At the time *Moffitt I* was decided, the government's proposed final order of forfeiture sought $103,800 from the Law Firm, and nothing from its partners. Thus, only the Law Firm filed a § 853(n) petition asserting an interest in the property to be forfeited.

Several additional points are pertinent but require little discussion. First, in seeking forfeiture from the Law Firm, William Moffitt, and John Zwerling, the government must trace property only to May 12, 1992, the date the restraining order was entered against the Law Firm and its partners.[21] After that date, the Law Firm and its partners had no authority to dispose of money received from Covington or property traceable to it. They therefore cannot defend themselves against forfeiture by arguing that they dissipated forfeitable property after that date.[22] Second, property consumed prior to May 1992 cannot be forfeited. For example, money used by the Law Firm to purchase electricity, or to rent space or equipment, leaves no traceable property in the Law Firm's hands. This is in part a consequence of the nature of consumable assets, assets that are used up or cease to exist, either immediately or over a relatively brief time. It is also a result in part of the fact that criminal forfeiture of substitute assets is available against a defendant, but not against a third party such as the Law Firm or its partners. *See* 21 U.S.C. § 853(p). It follows from this that the tracing trail is cut off when a third party uses forfeitable funds to purchase consumable assets. While a third party can legitimately frustrate forfeiture in this way, a defendant cannot do so because a defendant's substitute assets are subject to forfeiture.

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[21] Because Lisa Kemler was also subject to the May 1992 restraining order, she also cannot properly argue that she dissipated forfeitable property after the entry of the order. Yet, Kemler at present has no need for such an argument, since on the present record she appears to be a bona fide purchaser without reason to know of the possibility of forfeiture.

[22] If the government demands forfeiture from a party (i) to whom the May 1992 restraining order does not apply, and (ii) by whom § 853's bona fide purchaser protection is not successfully raised, the government would be required to prove that the party possessed traceable property on February 26, 1993, the date of Covington's forfeiture order.

IV.

With these principles in mind, analysis may now focus on the particular tracing-related discovery issues raised in this case. The task here is not to decide what property is or will be forfeited, but rather to consider the merits of the government's tracing theories where necessary to resolve the discovery issues presented.

• **Operating account records after January 1992.** The Law Firm initially provided records of its operating account from August 1991 to January 1992, the month during which the account first zeroed out. It refused to provide later records on the theory that, under the lowest intermediate balance rule, money in the account after January 1992 is not traceable to Covington's money. *See Banco Cafetero*, 797 F.2d at 1159, *supra* page 1160. But as the government correctly points out, the rule merely provides that subsequent deposits of *unrelated* money are not traceable funds *merely* because they rest in an account that once held tainted funds. Subsequent deposits of tainted, traceable funds are of course a different matter. The government contends that some of Covington's money, after leaving the operating account prior to January 1992, re-entered the account after it zeroed out.[28] To this, the Law Firm responds that the operating account zeroed out again in April 1992. Thus, the money that re-entered the operating account was spent in some way between January and April. The government is entitled to attempt to trace this money out of the operating account, and to identify property derived from it. Accordingly, it appears

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[28] This assertion appears accurate. The operating account first zeroed out on January 2, 1992. On January 8, $623.65 was transferred into the operating account from the savings account. And, throughout the period from January to April, the Law Firm received bi-weekly repayments, in the form of salary deductions, on a $25,000 loan made to one of its partners. Since this loan was arguably made with funds traceable to the tainted money, the government persuasively argues that the note and repayments pursuant to it are traceable property. *See infra* pp. 1164-1166.

that the Law Firm, appropriately, has now provided the government with records for the operating account for the period from January to May 1992.

• **Payees' identities.** The Law Firm redacted the names of all payees, except its partners, from the copies of its general ledger it provided to the government. In place of the payees' names, the Law Firm substituted general descriptions of the payee or the expenditure, such as "landlord," "surety," "bank," or "furniture." The government contends that more information is necessary, and asks the Law Firm to provide it with the checks or at least more specific identification of the payees.

There is a delicate balance to be struck here. The government needs information to prepare its tracing case and to attempt to meet its burden of proving that the Law Firm possessed property derived from the fees Covington paid even after the fees were spent. Yet unlimited or uninhibited discovery may be unduly burdensome and unnecessarily intrusive, given the privacy interests of the Law Firm and its clients. The Law Firm has disclosed payments made to its partners. There is no evidence or suggestion in the record to date that other parties are subject to forfeiture. *See* 21 U.S.C. § 853(c), (n). Thus, there appears little reason for further disclosure of payees' identities. The relevant issue is not to whom the Law Firm paid money, but rather, what the Law Firm received in return. Accordingly, the Law Firm must adequately described the expenditures made from this account to allow the government to determine whether any traceable property remains in the Law Firm's hands.[24]

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[24] In determining what information to disclose, the Law Firm should of course seek to redact only the information necessary to protect its genuine confidentiality interests. Just as the Law Firm may not drag its feet solely to resist the government's tracing efforts, the government may not use the present case as an opportunity to embark on a fishing expedition in the Law Firm's files. The government's pursuit of information should be carefully

• **Partners' salaries.** The government believes that salaries paid to the Law Firm's partners represented significant sums derived from the fees paid by Covington. Approximately fifty checks were written to partners between August 27, 1991 and January 28, 1992.[25] The government wishes to learn what happened to the checks, and in particular, whether the partners held property derived from the checks on May 12, 1992. The government's tracing argument here appears logically sound. The partners, arguably, were paid with funds derived from the tainted fees. The problem is one of balancing the government's discovery needs against the need to avoid untrammeled disclosure of the partners' personal financial affairs, and to avoid unnecessary expansion and protraction of this proceeding. If the funds were commingled in the partners' general accounts and devoted to meeting the partners' ordinary personal and family expenses, the funds must be deemed beyond the government's reach. To conclude otherwise would stretch the logic of tracing beyond the bounds of practicality and reasonableness. The government's argument that it should be allowed to trace the salary payments into any durable property purchased with these funds, such as the partners' televisions, books, and clothes, may pass muster logically, but logic must give way here to a sense of proportion and reasonableness. On the other hand, if certain salary payments were held intact or used to purchase durable assets, whether tangible or intangible, of substantial value, then the government may have a persuasive claim for forfeiture of these amounts. Therefore, the Law Firm is directed to respond

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tailored to reach only that information necessary to establishing its tracing case.

[25] The government is likely to discover further salary payments between the date traceable funds "re-entered" the operating account and the date the account zeroed out again in April 1992. *See supra* note 23 and accompanying text.

to the following interrogatories regarding those partners subject to forfeiture: [26]

1. Whether, between August 27, 1991 and April 8, 1992, any asset still in existence on May 12, 1992 was purchased by or on a partner's behalf for a price in excess of $1,000 [27] utilizing funds derived from the Law Firm's operating account or savings account.

2. Whether, between August 27, 1991 and April 8, 1992, periodic payments toward the purchase of property (including mortgage or loan payments) were made by or on a partner's behalf utilizing funds derived from the Law Firm's operating account or savings account, which payments total in excess of $1,000 over that period.

3. Whether, between August 27, 1991 and April 8, 1992, any money in excess of $1,000, derived from funds in the Law Firm's operating account or savings account, was transferred to an account or location where it remained intact on May 12, 1992.

4. Whether, between August 27, 1991 and April 8, 1992, money derived from the Law Firm's operating account or savings account was deposited in a bank account whose lowest intermediate balance [28] between the date of deposit and May 12, 1992 was greater than $1,000.

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[26] The Law Firm need not respond regarding salary payments to Lisa Kemler. *See supra* p. 1161-1162.

[27] The $1,000 amount is admittedly an arbitrary figure, but it appropriately reflects the various competing considerations involved here, including the need to balance the government's discovery needs against the burdens and privacy intrusions imposed on the Law Firm and its partners, and the fact that the government voluntarily remitted a significant amount of forfeited property to Covington.

[28] For purposes of this interrogatory, the lowest intermediate balance of an account is unaffected by the fact that it is a joint account.

If the answers to these interrogatories are affirmative or require explanation, the Law Firm must provide information about the funds in question.[29]

The Law Firm contends that any money deposited in a joint bank account, such as that of a partner and spouse, cannot be deemed traceable. To the extent that some fraction of the money becomes property of a person without reason to know of the possibility of forfeiture, this is surely true. *See* 21 U.S.C. § 853(c), (n). But to the extent the money remains property of a person subject to forfeiture, traceability and forfeiture are not avoided simply by the fact that the money rests in a joint account. The Law Firm is thus directed to answer the interrogatories above with respect to joint accounts, although it remains to be determined whether all or part of those accounts is property of a party not subject to forfeiture.

• **Moffitt's loan.**[30] On September 26, 1991, the Law Firm loaned $25,000 to one of its partners, William Moffitt, in return for which he gave the Firm a promissory note. Moffitt agreed to repay the loan with 8% annual interest by way of $361.57 deductions from his biweekly paychecks. As of December 1994, over $18,700 had been repaid. The $25,000 came out of the Law Firm's savings account, which was in turn funded with $50,000 from its operating account. These facts lead the government down two tracing paths.

First, the government persuasively argues that the promissory note (an account receivable of the Law Firm) as well as amounts already collected in repayment of the

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[29] By requiring the Law Firm to respond to these interrogatories, the Court expresses no opinion at present as to what property should be deemed to be traceable to the partners' salary payments and forfeited.

[30] The government requested information as to whether additional loans were made to the Law Firm's partners. The Law Firm indicates that there were none.

loan, are traceable property, because the $25,000 paid to Moffitt can be traced to drug trafficking proceeds received from Covington. An account receivable is clearly property that may be forfeited under § 853. *See* 21 U.S.C. § 853(b)(2) (defining "property" to include "intangible personal property, including rights, privileges, interests, claims, and securities"). Thus, the government is entitled to discovery of the loan's terms and repayment history. If the government establishes, as appears likely from the facts of record, that the account receivable was derived from the $103,800, all funds received in repayment of the loan may be subject to forfeiture. The government will be allowed to trace loan repayments made prior to the May 1992 restraining order to their whereabouts on that date. Since the Law Firm was bound by the restraining order not to dispose of property traceable to the tainted $103,800, which property included the loan repayments, the Law Firm will be obligated to forfeit an amount representing repayments made after May 1992. And, since the account receivable was forfeited to the government in February 1993, the Law Firm will forfeit that account receivable, that is, its right to the unpaid balance on the note. The government will step into the Law Firm's shoes and become entitled to collection of the note's unpaid balance.

It is irrelevant that Moffitt repaid the loan through salary deductions. Contrary to the Law Firm's assertions, the fact that Moffitt did not repay the loan in cash does not mean that no traceable property resulted from his repayments.[31] If the account receivable was derived from Covington's money, cash repayments would clearly be traceable to it. This conclusion cannot be altered by the fact that the Law Firm offset the repayments against

[31] The Law Firm argues that Moffitt's repayments by salary deduction are functionally equivalent to the Law Firm simply foregoing a portion of Moffitt's debt each pay period. This is incorrect, for a loan is not the same as a gift, as any employee repaying debt through salary deductions will attest.

Moffitt's salary. Here, as elsewhere, substance rather than form must control. But for Moffitt's loan, each of Moffitt's paychecks would have been greater by $361.57, and the Law Firm's operating account would have been poorer by the same amount. The $361.57 that remained in the operating account every two weeks by virtue of Moffitt's loan is money derived from the account receivable. Thus, the government is entitled to discover the terms and schedule of Moffitt's loan and its repayment, which information the Law Firm has now apparently given the government.

Second, the government believes that the $25,000 loaned was traceable property in Moffitt's hands, and it is interested in the whereabouts of that money. In a document submitted under seal,[32] the Law Firm explained the personal use to which Moffitt put the $25,000, a use which is irrelevant here except to note that it appears to yield no traceable property. The government is not yet fully satisfied by the explanation given, either because it (i) doubts the credibility of the explanation, or (ii) believes that the $25,000 was commingled with other moneys while in Moffitt's hands prior its eventual disposition. The government is entitled to further discovery to reassure itself on each point. As to the latter point, it must be noted again that tracing of funds through bank accounts must reflect reality. For example, if Moffitt borrowed the $25,000 intending to make a substantial charitable contribution, deposited the money in his personal account, and a week thereafter wrote a $25,000 check to the United Way, the government could not persuasively contend, under a "last in, last out" accounting approach, that

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[32] At the hearing of November 15, 1994, the Court accepted the document under seal, limiting access to the United States Attorney for the Eastern District of Virginia and the two Assistant United States Attorneys handling this case. By order of December 8, 1994, the Court denied the government's motion to unseal the document, but modified the protective order to widen access to other officials within the federal government with whom the government's attorneys need to consult in this matter.

the tainted $25,000 was still in Moffitt's account. *See Banco Cafetero,* 797 F.2d at 1159. Under the hypothetical facts, the only realistic conclusion would be that the borrowed $25,000 was in the account for a week and then was paid out to the charity. *See id.* at 1160; *supra* p. 1159. On the other hand, if the actual circumstances were unlike this example, the government might be entitled to argue that Moffitt still has property traceable to the $25,000. The Law Firm, therefore, need only provide the government with records sufficient to explain the disposition of the borrowed funds.[33]

• **Routine business expenses.** From the current record, it appears that during the relevant period the Law Firm made frequent payments from its operating account for routine business expenses such as advertising, library materials, and office furniture, equipment, and supplies. The government seeks to discover more about such payments in order to determine what property the Law Firm may have purchased with the tainted money between August 1991 and May 1992. The Law Firm resists this discovery because it believes forfeiture of inexpensive assets such as books and telephones is not contemplated by the forfeiture statute. Accordingly, the Law Firm disclosed that the only "capital items" [34] it purchased during the relevant time period were four office chairs costing a total of $1400. The remainder of the business expenditures have been identified only generally as made to "computer supplier," "office supply company," "publisher," and so forth.

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[33] In its most recent pleading in this matter, the government suggests that arrangements can be made with the recipient of the $25,000 for that money to be turned over to the Asset Forfeiture Fund, in which case Moffitt would become indebted to pay the recipient another $25,000. Because no discovery disputes arise from this theory, it is unnecessary to consider it here.

[34] The Law Firm defines this term as "tangible property that may have a resale value."

Section 853, on its face, applies broadly to property of any kind and value. *See* 21 U.S.C. § 853(b) (defining "property"). It cannot be construed to permit forfeiture only of Ferraris, Renoirs, and Armanis, and never desks, typewriters, and books. Nor does § 853 automatically exempt the Law Firm because it dissipated the tainted fees entirely in the ordinary course of business. Yet certain lines must be drawn in making the discretionary determination of how far tracing may stretch in a particular case, even though the lines drawn will inevitably appear somewhat arbitrary. In the circumstances of this case, forfeiture of items such as legal pads, office plants, and volumes from the shelves of the Law Firm's library is manifestly unwarranted. The Law Firm has identified the four office chairs as the most substantial durable assets purchased during the relevant time period. Whether the chairs are forfeited remains to be determined at the time the government completes its tracing effort and presents its final forfeiture claims. But further discovery and identification of less significant assets is inappropriate.

The Law Firm also disclosed that, between August 1991 and May 1992, it made monthly lease payments on telephones and one photocopier.[35] After May 1992, the Law Firm purchased the photocopier pursuant to an option to purchase in the lease. In addition, the Law Firm made payments to a predecessor firm of one of its partners, John Zwerling, for use of another photocopier. The predecessor firm used these payments to repay a bank loan with which it purchased the photocopier. In general, rent payments leave no traceable property because a lessee purchases an intangible, impermanent property interest, that is, the right to use property for a specified time. When the time expires, the lessee has no remaining property interest and holds no property derived from the rent payments. Installment payments toward the purchase of

[35] This photocopier was originally leased by a predecessor firm of William Moffitt, one of the Law Firm's principals. The Law Firm assumed its lease after the two firms merged.

property, including "rent-to-own" payments and purchase-money loan repayments, are a different matter. If the Law Firm's payments made between August 1991 and April 1992 contributed to its purchase of one or both of the copiers, then a portion of the copiers may be subject to forfeiture. The government is therefore entitled to discover the terms and nature of the payments made by the Law Firm with respect to the photocopiers.

• **Credit card bills.** Several checks were drawn on the Law Firm's operating account between August 1991 and January 1992 to pay American Express and Optima credit card bills. The cards were used by the partners for both personal and business expenses. The Law Firm paid the entire bills, and the partners reimbursed the Firm for personal expenditures through paycheck deductions. The government seeks discovery of the credit card statements for which the checks were written in order to discern if the cards were used to purchase property traceable to the tainted fees.

The government's tracing theory here is logically sound. If the Law Firm or one of its partners held property on May 12, 1992 that was purchased, by credit card, with money derived from the tainted funds, that property may now be subject to forfeiture. Many credit card purchases, such as meals and hotel rooms, yield no traceable property because the item purchased is consumed. Moreover, purchases of durable property of insubstantial value also do not result in property that can be deemed traceable and forfeitable. Since some credit card purchases may yield traceable property, the government is entitled to information explaining the purchases made with money arguably derived from the tainted fees. The Law Firm has explained that, for the period from August 1991 to January 1992, the credit cards were not used for expenditures other than for non-reimbursable business or ordinary living expenses. Thus, it appears that no traceable property arose from the credit cards' use in that period. In any event, the Law Firm must provide the government with information regarding the credit cards' use from Jan-

uary to April 1992. Specifically, the Law Firm must indicate whether, between August 27, 1991 and April 8, 1992, any asset still in existence on May 12, 1992 was purchased with the credit cards for a price in excess of $1,000. If the answer to this interrogatory is affirmative or requires explanation, the Law Firm must provide further relevant information.

• **Escrow account records.** The Law Firm placed $10,000 of the fees received from Covington in its "omnibus" escrow account, an account which contained money of other clients. Separate ledgers were kept for each client. Covington's ledger shows only $3695 of his $10,000 remaining. The Law Firm explains that the remainder was spent in representing Covington. The government contends that the escrow account, despite the fact that it contained many clients' funds, is one bank account for tracing purposes. The Law Firm placed $10,000 of Covington's money in the account, and the account has always contained more than $10,000. Relying on the "last in, last out" accounting method described in *Banco Cafetero*, 797 F.2d at 1159, the government argues that all $10,000 of Covington's money stayed in the escrow account and that $10,000 from the account is now subject to forfeiture.

The government's position is an unrealistic interpretation of the facts. First, the omnibus escrow account is not properly treated as one account if, in substance, it was not operated as one. Rather than opening a separate account for each of its clients, the Law Firm reasonably used one escrow account, but then maintained separate ledgers tracking the deposits and withdrawals for each client. In so doing, the Law Firm took care not to spend one client's money on another's representation. In substance, the Law Firm acted as though each client's money was in a separate escrow account. Moreover, even if the entire omnibus escrow account were appropriately treated as a single account for tracing purposes, the government's accounting

theory ignores the reality here that $6,305 of the $10,000 was actually spent on Covington's representation. It is true that neatly matching tainted deposits with particular withdrawals is usually difficult, and hence the government should have some latitude in choosing among accounting methods. *See Banco Cafetero*, 797 F.2d at 1160; *supra* p. 1159. But here, though Covington's money was commingled with other clients' funds, the Law Firm treated each clients' money separately on its ledgers, and it is plainly possible to identify which withdrawals came from Covington's money. It is therefore inappropriate to ignore reality and to treat all $10,000 of Covington's money as remaining in the escrow account.

The conclusion that the majority of Covington's $10,000 was withdrawn from escrow may not end the matter if any of the $6,305 can be traced to forfeitable property. The Law Firm therefore must provide the government with information sufficient to enable the government to determine if traceable property arose from the withdrawals. To be sure, the government is limited in following the tracing trail by the general principles already set forth here, including the fact that the government remitted $2,486 of forfeited property and cannot pursue lesser amounts from the law firm now, and the fact that expenditures for many items (including travel, meals, filing fees, copying, postage, and telephone calls) do not yield traceable property. It appears that the Law Firm has now supplied the government with a copy of Covington's ledger sheet, with some information redacted. The government may need additional information to determine what traceable property arose from the withdrawals noted on the ledger. In responding, the Law Firm may redact information to the extent necessary to preserve confidentiality, keeping in mind that Covington has waived his attorney-client privilege with respect to all information in the Law Firm's possession.

• **Predecessor law firm's accounts.** The Law Firm's operating account records reveal that a number of pay-

ments were made to predecessor law firms of the Law Firm's partners. Several types of payments to predecessor firms have been identified.

First, the Law Firm made payments to a predecessor firm of John Zwerling in relation to a photocopier. The government's discovery efforts with respect to these payments is treated elsewhere in this opinion. Second, $15 was withdrawn automatically by the bank from the Law Firm's account as a service charge to maintain the account of Zwerling's predecessor firm. The bank that received the $15 is unquestionably a bona fide purchaser without reason to know of the possibility of forfeiture. *See* 21 U.S.C. § 853(c), (n). No further discovery is appropriate as to this *de minimus* amount. Third, on May 9, 1992, the Law Firm made a payment of $1,316 to Zwerling's predecessor firm, which amount represented the portion of a fee for work done by the predecessor firm on a case prior to the firms' merger. Since this payment was made after the Law Firm's operating account "zeroed out" a second time in April 1992, the $1,316 is clearly not subject to forfeiture.

Fourth, just prior to surrendering to the authorities on November 1, 1991, Covington gave $32.62 cash to the Law Firm. The money was inadvertently deposited in a trust account of William B. Moffitt and Associates (the "Associates account"), a predecessor firm of one of the Law Firm's principals. The Law Firm eventually noted the error and placed the $32.62 in its escrow account in Covington's name on October 26, 1992. In pursuing forfeiture of this money, the government requested account records for the Associates account from August 1991 to October 1992. The Law Firm declined to provide the records, on the ground that the amount involved is *de minimus*. While § 853 allows forfeiture of property of any value, great or small, subject to judicial discretion under § 853(g), discovery under § 853 is a different matter. It is certainly within courts' discretion to deny

§ 853(m) discovery requests that greatly overshadow the property at stake. In any event, further discovery is unnecessary here because the Law Firm effectively concedes the forfeiture of this money. The Law Firm explained that it received the $32.62 from Covington and deposited it in the Associates account, where it remained on May 12, 1992, the date of the restraining order compelling the Law Firm not to transfer or convey it. Yet the Law Firm admits it later transferred the money to its escrow account. Since grounds for forfeiture of the $32.62 are plainly present, the Law Firm need provide no further discovery with respect to the Associates account.

• **Payments to entities partly owned by the Law Firm's partners.** The government requested information regarding any affiliation between the Law Firm's partners and its landlords, and learned that the Law Firm rented space from Calumnia Investment Group ("Calumnia"), a Virginia partnership in which one of the Law Firm's principals, John Zwerling, owns a 35% interest. Between August 1991 and January 1992, the Law Firm paid nearly $10,000 to Calumnia from its operating account. The government presumes that Calumnia used this money to pay its mortgage on the rental property, and believes it is entitled to forfeiture of that property to the extent of Zwerling's fractional ownership interest.[36]

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[36] Two forms of property are involved here, (i) Calumnia's specific partnership property, which includes the real property rented to the Law Firm, and (ii) Zwerling's partnership interest in Calumnia, his intangible ownership share of the partnership. *See* Va.Code §§ 50-24, 50-25. If Calumnia were to forfeit the former, the government would become the outright owner of a fractional interest in the rental property. *See* Va.Code § 50-25(B)(3) ("A partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership."). If Zwerling were to forfeit the latter, the government would step into his shoes, becoming a partner in Calumnia entitled to Zwerling's share of profits and surplus. *See* Va.Code §§ 50-26, 50-28 (judgment creditor of partner may obtain charging order against partnership interest).

An example illustrates the limitations on such forfeiture. If the Law Firm had taken Covington's cash and immediately used it to purchase a new computer system from IBM for $103,800, the computers would be subject to forfeiture by the Law Firm,[37] but the government could not obtain forfeiture of $103,800 from IBM's bank account. IBM, of course, would be a bona fide purchaser of the money, without reasonable cause to know it is subject to forfeiture. *See* 21 U.S.C. § 853(c), (n). Would this result change if one of the Law Firm's partners was an IBM shareholder? Surely, the answer is "no." The money in IBM's account would not be forfeited, because despite the partner's role in the corporation, IBM would still qualify for § 853's innocent purchaser protection. And the partner's IBM stock would not be forfeited either, because it would not be traceable to the tainted money, there being no relation[38] between the $103,800 computer purchase and the partner's shares.[39]

Zwerling's part ownership of Calumnia is potentially distinguishable from this hypothetical example in several ways. First, the government might believe that Calumina, unlike IBM in the example, was not reasonably unaware that the rents it received were subject to forfeiture. If so, the government could demand forfeiture by Calumnia, and the bona fide purchaser protection would not succeed as a defense. *See* 21 U.S.C. § 853(c), (n). While Zwer-

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[37] The Law Firm received nothing from Calumnia akin to the computers in the IBM example. In its dealings with Calumnia, the Law Firm purchased use of space, an intangible property right that cannot now be forfeited. *See supra* p. 1162.

[38] No relation, that is, other than the extremely tenuous connection that all IBM's revenues incrementally benefit the value of its shares.

[39] There is one additional type of property in the IBM example that might conceivably be forfeited, namely dividends paid by IBM. Calumnia paid no "dividends" that is, it made no distributions of partnership income to Zwerling or its other partners during the relevant time period.

ling likely had a greater role in Calumnia than he would as a shareholder of IBM, the government would still be hard pressed to offer evidence that Calumnia, as an entity, reasonably could have been aware that the rent checks it received were subject to forfeiture.[40] The current record facts do not establish a realistic possibility that the government could successfully obtain forfeiture of specific partnership property from Calumnia.

Second, the government might seek to compel Zwerling to forfeit his partnership interest in Calumnia. To do so, it must distinguish the IBM example by contending that the connection between Zwerling's partnership interest and the rents Calumnia received is much closer than the connection between Zwerling's hypothetical IBM stock and the Law Firm's imaginary computer purchase. If so, the government could argue, the rents are traceable to the mortgage payments, the mortgage payments are traceable to the mortgaged property, and the mortgaged property is traceable to Zwerling's partnership interest. Therefore, the theory goes, Zwerling must forfeit his interest in Calumnia, at least to the extent of his proportionate share of the approximately $10,000 of rent payments. While there is surely some logical relation between Zwerling's

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[40] The burden would of course be on Columnia to prove by a preponderance of the evidence that it qualifies for § 853(c)'s innocent purchaser exception. *See* 21 U.S.C. § 853(n)(6). Calumnia would surely contend that it was wholly unaware of the possibility of forfeiture, and in refuting this, the government would receive little or no help from the notion that Zwerling's awareness is attributable to Calumnia under partnership law. In Virginia law, such attribution occurs when a partner has "notice" of a fact, meaning he receives oral or written notification of it, or "knowledge" of a fact, meaning he has actual knowledge of it or the circumstances demonstrate bad faith. *See* Va.Code §§ 50-3, 50-12. Although the Law Firm could not prove by a preponderance that it qualified for § 853's bona fide purchaser protection, there are no facts indicating Zwerling had actual notice or knowledge that the $103,800 was subject to forfeiture.

partnership interest and the tainted rents,[41] it is too tenuous to justify the conclusion that the partnership interest is "derived from" the rents within § 853's meaning.

In sum, the Law Firm's rent payments did not produce traceable property to be forfeited. Because, on this record, it appears that (i) Calumnia is not subject to forfeiture, and (ii) Zwerling does not hold property that can be deemed traceable to the rent payments, further discovery regarding the Law Firm's rent payments to Calumnia is unnecessary.[42]

• **Payments to entities owned by spouses of the Law Firm's partners.** The government also requested information about payments from the Law Firm's operating account to spouses and immediate family members of the partners. In response, the Law Firm disclosed that certain items described on the redacted ledger as "professional fees" were paid to a corporation solely owned by a partner's spouse. Specifically, these payments were to Patricia West, John Zwerling's wife, who performed bookkeeping services for the Law Firm beginning in August 1991. Any attempt to require West to forfeit property would likely be blocked by the assertion of § 853's bona fide purchaser protection. *See* 21 U.S.C. § 853(c), (n). There are no record facts refuting the conclusion that West was reasonably without cause to know her fees were subject to forfeiture. Alternatively, the government might wish to discern what West did with her fees, in the hope that it could trace the fees through her to property in the hands of some entity, such as the Law Firm or her husband Zwerling, that would be forfeitable. The connection

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[41] Specifically, Calumnia's revenues increase the value of its partnership shares, just as IBM's revenues increase the value of its stock. And, Calumnia being a smaller financial entity than IBM, the connection is less diluted.

[42] In addition, the Law Firm attests that Calumnia has no equity in the property anyway, as demonstrated by the fact that the building is currently for sale at the price of the mortgage.

between Covington's money and such property would be attenuated at best, too attenuated to justify burdensome and intrusive discovery or to warrant a realistic conclusion that the property is "derived from" Covington's money within § 853's meaning. Thus, there is not a realistic possibility that further discovery regarding West's fees would yield traceable property. In addition, there is no evidence that West played a role in the Law Firm's acceptance of Covington's money, or had decision-making authority over the Law Firm's operations. Extra caution is warranted before infringing the privacy of, and imposing discovery burdens on, a person with no responsibility for the present proceeding. Further discovery with regard to West's fees is therefore inappropriate.

• **Insurance.** The government also believes traceable property arose from several payments made by the Law Firm to insurance companies. In some circumstances, insurance may yield traceable property. For example, if a drug dealer uses his illicit profits to purchase auto insurance, and later wrecks his car and collects under the policy, the insurance money is derived from the insurance premiums. On the other hand, if the drug dealer buys the insurance, but drives safely and avoids accidents, no benefits will be paid, and no property traceable to the insurance premiums arises.

In the present case, the Law Firm made several payments on insurance policies, but none of the policies had a cash value or paid benefits to the Law Firm. The only benefits paid under the insurance policies were either (a) paid directly to health-care providers for services rendered to employees of the Law Firm, or (b) paid to employees in reimbursement for medical expenses already paid by the employees. Neither type of payment results in traceable property. The government clearly cannot obtain forfeiture of fees paid directly to health-care providers who had no reason to know of the prospective forfeiture. *See* 21 U.S.C. § 853(c), (n). Nor do Law Firm employ-

ees, even partners, reimbursed for their medical expenditures, now possess property "derived from" tainted insurance reimbursement payments. Where an employee pays a certain amount to a doctor for medical care, and an insurance company reimburses her soon after in the same amount, the insurance company has, in substance, paid the doctor. The fact that the insurance company did not pay the doctor or hospital directly in every instance does not alter the substance of the transactions. *See supra* p. 1159. For tracing purposes, the Law Firm's employees did not retain money derived from the tainted fees by virtue of the medical expense reimbursements, and therefore discovery regarding the Law Firm's insurance payments is unnecessary.

• **Taxes.** The government also presents a novel tracing theory regarding payments made by the Law Firm to the IRS to satisfy its partners' income tax withholding obligations. The Law Firm made a number of such payments between August 1991 and January 1992, and the government believes that several of the Law Firm's partners received substantial tax refunds for the 1991 tax year. The government's theory is that the refunds derived, in part, from the withholding payments because the refunds constitute the return of money withheld in excess of the tax owed.[48]

If the government establishes that withholding payments were made with money derived from the $103,800 received from Covington, a portion of the resulting tax refunds might be deemed traceable property. It is important to note that the entire refund would not be traceable unless the partners' entire withholding for the year was derived from tainted money. The question, akin to tracing money through bank accounts, is one of matching deposits with withdrawals, that is, matching the withholding paid to the IRS with the tax refunds. The accounting

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[48] *See* 26 U.S.C. § 31 (amount withheld from wages for tax is allowed as credit against tax imposed that year).

principles described in *Banco Cafetero* have not previously been applied in the context of tax returns, yet seems appropriate in this context as well. Under these principles, where some, but not all, of the withholding constituted traceable money, it would be unrealistic to treat all of the tained money as going toward the tax refund rather than to taxes. For example, if an employer paid $200 of tax withholding, $50 of which derived from drug dealing, and the IRS paid the employee a $60 tax refund, the government may not properly treat the entire tainted $50 as flowing into the taxpayer's hands via the refund. The more realistic conclusion is that one-fourth of the withholding was tainted, and so one-fourth, or $15, of the refund was derived from the tainted withholding. *See Banco Cafetero*, 797 F.2d at 1159 (describing "averaging" or "pro rata" accounting approach). Since some fraction of the partners' refunds is arguably derived from the tainted fees, the government is entitled to discovery on this issue. The Law Firm and its partners do not need to disclose any tax information not strictly relevant to the government's argument here, and it appears that the only necessary data are the withholding and refund amounts for the relevant tax years.[44]

V.

In summary, it is important to reiterate that this opinion resolves disclosure disputes, not disputes over whether particular assets are subject to forfeiture. While observations in the opinion may well accurately foreshadow final forfeiture decisions, no final disposition of those disputes is reached here. The government must now prepare its

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[44] As explained above, refunds paid to Lisa Kemler are not subject to discovery of forfeiture. *See supra* p. 16. And, assuming one or more partners filed joint returns, the portion of the refunds constituting property of other persons, such as spouses, is also not subject to forfeiture, *see supra* p. 23, though the fact that a return is a joint one does not bar the government's discovery of information regarding the refund and withholding.

final proposal for forfeiture. The parties are directed to submit additional materials according to the schedule in the accompanying order, and are further advised to make every effort to resolve any additional discovery disputes consistent with the principles outline here. As the parties recognize, this case has gone on long enough, and there are numerous significant issues to be resolved on appeal. An expeditious end to this stage of the litigation is desirable for all parties.

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

Misc. No. 93-0006-A

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

Oct. 12, 1994

MEMORANDUM OPINION

ELLIS, District Judge.

The question presented in the final chapter of this novel criminal forfeiture proceeding is whether the government can use a criminal forfeiture statute, 21 U.S.C. § 853, to reach the proceeds of drug trafficking when those proceeds were used by the drug trafficker to pay legal fees and the law firm spent the fees prior to the entry of the forfeiture order. More particularly, the question may be stated as follows:

> Can the government, in such a criminal forfeiture proceeding, require a law firm to pay the government a sum of money equal to a cash legal fee the law firm received from a client when:
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> (i) a court ordered the forfeiture of the legal fee, having determined the cash involved constituted proceeds from drug trafficking;
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> (ii) a court also determined that the law firm had no right, title or interest to the legal fees because it was not reasonably without cause to believe the fee was subject to forfeiture; and

(iii) it appears that the law firm deposited the cash legal fee in its general account and spent the account before the date of the entry of the forfeiture order.

I[1]

William Paul Covington ("Covington") trafficked in cocaine and marijuana in northern Virginia for several years. Federal authorities eventually became aware of the operation and, by the summer of 1991, began to seize Covington's assets for forfeiture.[2] Covington was represented at this point by the law firm of Phillips, Beckwith and Hall. In August 1991, Covington sought to retain the law firm of Moffitt, Zwerling and Kemler, P.C. ("the Law Firm") as his new counsel. The Law Firm informed Covington that he would need to provide fees up front in the amount of $100,000. Covington brought a total of $103,800 in cash to the Law Firm on August 23 and August 24, 1991. The Law Firm told Covington that it would hold the extra $3,800 to cover expenses.

The Law Firm's partners filed Currency Transaction Reports, or Forms 8300, disclosing the receipt of the $103,800. These forms require identification of the entity from whom the cash is received. In this instance, the Law Firm, on attorney-client privilege grounds, chose not to disclose Covington's identity on the forms it filed.[3]

The government was wholly unaware of Covington's $103,800 cash payment to the Law Firm until November

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[1] The earlier chapter of this proceeding is chronicled at *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463 (E.D.Va.1994), *appeal dismissed*, No. 94-5167 (4th Cir. June 28, 1994). Only those facts necessary for context and the resolution of the question presented are set forth here.

[2] Those assets are identified in *Moffitt*, 846 F.Supp. at 465-66.

[3] Though not yet settled in this circuit, two circuits reject the attorney-client privilege argument and require disclosure of the client's name on the form. *See Moffitt*, 846 F.Supp. at 466-67 n. 7.

1991, when government agents secured the cooperation of William "Junior" Atkinson, one of Covington's major customers. Covington, it appears, needed cash to pay the Law Firm's retainer, and sought out Atkinson to collect on a $32,000 debt owed by Atkinson for past drug transactions. Thus, the government learned through Atkinson in November that Covington had transferred a large amount of cash to the Law Firm. Because the government was unable to obtain conclusive evidence of Covington's payment to the Law Firm, the $103,800 in fees was not specifically addressed either in the original indictment of Covington on October 30, 1991 or the superseding indictment of January 9, 1992. Both indictments, however, contained a forfeiture count broadly phrased to cover "any and all properties constituting, or derived from, proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy."

The government did not obtain further evidence of the fees paid by Covington until February 1992, when government investigators received copies of the Form 8300s filed by the Law Firm, and the Currency Transaction Report forms from the Law Firm's bank, Burke & Herbert Bank, reflecting two deposits totaling $103,800. Those documents established that the Law Firm had received and deposited $103,800 in cash in late August 1991, but did not identify the source of the money. Thereafter, the government obtained a search warrant to examine the bank's records regarding the deposits. While the results of the search warrant further corroborated that the Law Firm had deposited the $103,800, the records seized did not tie that money to Covington.

On February 11, 1992, the government served a subpoena duces tecum on the Law Firm, seeking disclosure of the amount and form of payment received from Covington. The Law Firm moved to quash the subpoena on the ground that it would impair Covington's right to obtain fully effective counsel. Another judge of this division

granted the motion to quash the subpoena on March 13, 1992. The government appealed this ruling, but the Fourth Circuit Court of Appeals dismissed the appeal as moot after the Law Firm agreed voluntarily to supply enough of the requested information to the government. *United States v. Covington*, No. 92-5201 (4th Cir. Oct. 15, 1992).

Strongly suspecting that Covington was the source of the $103,800 in cash deposited by the Law Firm in late August 1991, the United States Attorney for the Eastern District of Virginia elected to seek forfeiture of the fees and, on March 16, 1992, requested authorization to do so from the appropriate Department of Justice (DOJ) official. On May 12, 1992, the DOJ advised the prosecutors in the case that the request had been approved. That same day, the government filed a Bill of Particulars which specifically identified the $103,800 as property subject to forfeiture under Covington's indictment.

The next day, the government moved for an order to restrain the Law Firm from expending any monies received from Covington. The Court granted the order that day. This order enjoined the Law Firm from "transferring, conveying, liquidating, encumbering, wasting, secreting, modifying the terms of or disposing of any real or personal property or United States Currency described in the indictment returned in this case or in the Bill of Particulars, or any property traceable to such property."

The Law Firm maintains that by May 1992 it had only $3,695 of the money it received from Covington. The remainder of the $103,800 had been spent or disbursed before the entry of the restraining order. At the time Covington retained its services, the Law Firm had two bank accounts: a general operating account and an escrow account. The Law Firm initially deposited $93,800 of Covington's money in the general operating account, and placed the remaining $10,000 in the escrow account. In September 1992, the Law Firm moved a portion of Cov-

ington's money from the general operating account into a new savings account.[4] Law Firm records indicate that by the end of January 1992 the savings account had a zero balance and the general operating account had a slight negative balance. On that basis, the Law Firm contends that it no longer possessed any of Covington's money in either of these accounts at the time of the May 1992 restraining order. Meanwhile, the Law Firm gradually withdrew funds from the $10,000 in the escrow account in order to pay for expenses incurred in representing Covington. By the time the restraining order was entered in May 1992, the escrow account contained only $3,695.[5]

In August 1992, a conflict of interest compelled the Law Firm to withdraw as Covington's counsel.[6] With the aid of appointed counsel, Covington eventually pled guilty to three charges, specifically, a drug conspiracy in violation of 21 U.S.C. § 846, money laundering in violation of 18 U.S.C. § 1956, and a firearms offense in violation of 18 U.S.C. § 924(c). At sentencing on February 26, 1993, the Court, *inter alia*, ordered the forfeiture of virtually all of Covington's assets, including the $103,800

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[4] The Law Firm made several large transactions involving the general operating account in late 1991. On September 13, 1991, the Law Firm transferred $50,000 out of the general operating account in order to open a savings account. On September 25, 1991, the Law Firm made a loan of $25,000 from that savings account to one of its partners, William B. Moffitt. In October 1991, the Law Firm transferred a total of $21,000 from the savings account back into the general operating account.

[5] The $3,695.95 in the escrow account included a small amount, $32.62, which Covington gave to the Law Firm prior to his surrendering to the authorities on November 1, 1991.

The Law Firm indicates that its expenses in the representation of Covington were $14,679.91, although apparently only $6,336.67 was taken from the escrow account to cover those expenses.

[6] The circumstances surrounding the Law Firm's withdrawal are described in *Moffitt*, 846 F.Supp. at 467.

he paid to the Law Firm, contingent on the rights of any third parties to be claimed pursuant to 21 U.S.C. § 853(n).[7]

Thereafter, the Law Firm filed a petition under § 853(n), contending that the forfeiture was improper because the Law Firm was "reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B). After an evidentiary hearing, the Court found that the $103,800 paid to the Law Firm constituted proceeds of Covington's drug trafficking, and that the Law Firm had not met its burden of proving that it took the cash from Covington without reasonable cause to believe that it was subject to forfeiture. *Moffitt*, 846 F.Supp. at 468-69, 472-76. This ruling had the effect of leaving in place the February 1993 final order of criminal forfeiture as to the $103,800.[8]

The government has now proposed a final decree of forfeiture of the $103,800. The Law Firm opposes that decree on the grounds that, although the $103,800 is property subject to forfeiture, that property was largely dissipated well before the entry of the restraining order, and the Law Firm now possesses only $3,695 of that property.

II

As this is a criminal forfeiture[9] proceeding under 21 U.S.C. § 853, analysis properly begins with an explication

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[7] In addition to the forfeitures, Covington was sentenced to 262 months incarceration to be followed by five years of supervised release, and $150 in special assessments. A Rule 35(b) motion for reduction of sentence, based on substantial assistance to law enforcement authorities, has been filed.

[8] The Law Firm appealed this decision to the Fourth Circuit Court of Appeals, which dismissed the appeal as interlocutory. *In re Moffitt, Zwerling & Kemler, P.C.*, No. 94-5167 (4th Cir. June 28, 1994).

[9] Historically, the law recognized two kinds of forfeiture, criminal and civil. *See Coffey v. United States*, 116 U.S. 436, 442-44,

of the overall statutory scheme.[10] And, the proper starting point for this task is § 853(a), as it contains the core of the statute. It provides that a person convicted of violating a federal drug law punishable by imprisonment of more than one year must forfeit any property "constituting, or derived from, any proceeds the person obtained, directly or indirectly" from the crime. 21 U.S.C. § 853(a)(1).[11] Thus, under § 853(a), a defendant must forfeit criminal proceeds, and in addition, property which the government establishes to be derived therefrom. Section 853(b) clarifies that the term "property" includes both real and personal property, whether tangible or intangible. Significantly, the government has the benefit of

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6 S.Ct. 437, 439-41, 29 L.Ed. 684 (1886). Criminal forfeiture was part of a criminal's punishment. The forfeiture order was part of the defendant's sentence, and no separate proceeding was necessary. The forfeiture was *in personam* and based on the unlawful conduct of the defendant. In contrast, a civil forfeiture was an *in rem* proceeding. The item of property was treated as being "guilty," regardless of the innocence or guilt of the person. As a result, in civil forfeiture, the government was required to bring a separate action against the property. For forfeiture law's historical background, see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83, 94 S.Ct. 2080, 2090-92, 40 L.Ed.2d 452 (1974); *United States v. Nichols*, 841 F.2d 1485, 1486-87 (10th Cir.1988); Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L.Rev. 57, 59-69 (1983).

[10] A similar forfeiture scheme is found in the Racketeer Influenced and Corrupt Organizations (RICO) statute. 18 U.S.C. § 1963(a). The criminal forfeiture provisions in RICO and § 853 share a common origin and purpose, as well as substantially similar language. It follows, therefore, as settled precedent confirms, that decisions interpreting the RICO forfeiture provisions are persuasive authority on the interpretation and application of § 853. *See United States v. Ripinsky*, 20 F.3d 359, 364 n. 6 (9th Cir.1994); *United States v. Amend*, 791 F.2d 1120, 1127 n. 6 (4th Cir.), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 353 (1986).

[11] The statute also requires forfeiture of any property intended for use in commission of the crime, and any interest in a continuing criminal enterprise. 21 U.S.C. § 853(a)(2)-(3). These are not at issue in the present matter.

a rebuttable presumption that property is forfeitable where a defendant acquired it during the period of the criminal activity and there is no likely source for it other than criminal profits or proceeds. 21 U.S.C. § 853(d).

Section 853 also contains a "substitution of assets" provision that applies when the criminal defendant disposes of his crime-related property prior to forfeiture. 21 U.S.C. § 853(p). Without this section, defendants could circumvent forfeiture by simply spending or transferring property when they believe a forfeiture order is imminent. Thus, § 853(p) provides that:

> If any of the property described in subsection (a) of this section, as a result of any act or omission of the *defendant*—
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> (1) cannot be located upon the exercise of due diligence;
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> (2) has been transferred or sold to, or deposited with, a third party;
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> (3) has been placed beyond the jurisdiction of the court;
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> (4) has been substantially diminished in value; or
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> (5) has been commingled with other property which cannot be divided without difficulty;
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> the court shall order the forfeiture of any other property *of the defendant* up to the value of any property described in paragraphs (1) through (5).

21 U.S.C. § 853(p) (emphasis added). Congress added this provision in 1986, confirming what most courts had already held,[12] namely that a criminal forfeiture order

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[12] Most circuits, including this one, had held that under the law prior to § 853(p)'s enactment, the defendant faced *in personam* forfeiture under § 853(a), reaching any of his assets, without resort to tracing. *See, e.g., United States v. Amend*, 791 F.2d 1120, 1127 & n. 6 (4th Cir.), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399,

under § 853, as in traditional *in personam* forfeiture, reaches any of the defendant's assets, regardless of their source or whether they are traceable to criminal activity. *In re Billman*, 915 F.2d 916, 920 (4th Cir.1990), *cert. denied*, 500 U.S. 952, 111 S.Ct. 2258, 114 L.Ed.2d 711 (1991). Section 853(p) enables the government, when pursuing forfeiture from the defendant, to avoid relying on the "derived from" phrase in § 853(a)(1), and to escape the difficulties of proving that particular assets are traceable to criminal proceeds. Thus, when seeking forfeiture from the criminal defendant, the government can seize either the criminal proceeds themselves under § 853(a) or any substitute assets under § 853(p). Only a moment's reflection is needed to see that this provision confers a significant and far-reaching forfeiture power on the government. Yet, conspicuous by its absence is any express, analogous power to reach the substitute assets of a transferee of forfeited property.

The substitute assets provision is not the only part of § 853 designed to prevent defendants from circumventing anticipated forfeiture orders. Section 853(c) establishes that the "relation back" doctrine, developed in the law of *in rem* forfeiture,[13] applies under § 853.[14] Under this

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93 L.Ed.2d 353 (1986); *United States v. Robilotto*, 828 F.2d 940, 948-49 (2d Cir.1987) (applying pre-§ 853(p) law); *United States v. Ginsburg*, 773 F.2d 798, 800-03 (7th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986) (overruling *United States v. Alexander*, 741 F.2d 962 (7th Cir.1984), and *United States v. McManigal*, 708 F.2d 276 (7th Cir.1983), *cert. granted and judgment vacated*, 464 U.S. 979, 104 S.Ct. 419, 78 L.Ed.2d 355 (1983)); *United States v. Conner*, 752 F.2d 566, 576-77 (11th Cir.), *cert. denied*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985). In the same vein, this circuit has since expressly recognized that in enacting § 853(p), Congress codified what was already implicit in § 853(a). *In re Billman*, 915 F.2d at 920.

[13] *See United States v. Stowell*, 133 U.S. 1, 16-18, 10 S.Ct. 244, 247-48, 33 L.Ed. 555 (1890).

[14] Section 853(c) provides that:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the

doctrine, the government is deemed to have title in the tainted property from the date of the illegal conduct. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627-28, 109 S.Ct. 2646, 2653, 105 L.Ed.2d 528 (1989).[15] As a result, where, as here, the defendant has transferred forfeitable property to a third party, the transfer may be void and the property "may be the subject of a special verdict of forfeiture and thereafter shall be forfeited to the United States." 21 U.S.C. § 853(c). Section 853(c) pertains to "property described in subsection (a)" of the statute, which, as noted, reaches both criminal proceeds and other property derived from, *i.e.* traceable to, such proceeds. Thus, property traceable to the criminal activity can be reached even in the hands of a third party transferee. But the third party may successfully oppose the forfeiture through a petition under § 853(n) by proving, by a preponderance of the evidence, either that the third party had a superior interest in the property at the time the defendant committed the crime, or that the third party was a bona fide purchaser reasonably without cause

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commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

[15] The "relation back" doctrine, whether at common law or under statute, does not vest title in the United States automatically and without judicial decree. Instead, at the time the court orders the forfeiture, the relation back doctrine operates to vest title in the United States effective from the date of the criminal conduct. *United States v. 92 Buena Vista Avenue*, —— U.S. ——, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993). Though there was no majority opinion in *Buena Vista*, six Justices agreed on this point. —— U.S. at ——, 113 S.Ct. at 1135-37 (Stevens, J., plurality); *id.* at ——, 113 S.Ct. at 1138-39 (Scalia, J., concurring in judgment).

to believe that the property was subject to forfeiture. 21 U.S.C. § 853(n).

While subsections (a), (c), and (p) define the property set subject to forfeiture and thus constitute the heart of § 853, the statute also includes several ancillary measures that may be invoked in aid of effecting forfeitures. Thus, the government may seek restraining orders, injunctions, or warrants of seizure to preserve the availability of the defendant's property prior to forfeiture. 21 U.S.C. § 853(e)-(f). And, after an order of forfeiture, a court may order the deposition of witnesses and the production of documents to "facilitate the identification and location of property declared forfeited." 21 U.S.C. § 853(m). A court may also "enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited." 21 U.S.C. § 853(g).

This brief and somewhat sterile outline of the statute does not adequately convey the scope and nature of § 853 criminal forfeiture, which is more vividly illustrated through a series of hypothetical situations. Suppose, for example, that a drug trafficker accumulates cash through cocaine trafficking. The money is subject to forfeiture under § 853(a).[16] Suppose further that the drug trafficker uses the cash to purchase a new Jaguar. In this event, the government could compel forfeiture of the Jaguar as property derived from criminal proceeds under § 853(a), or alternatively, as substitute property under § 853(p). If the drug dealer disposed of the cash and the car prior to entry of the forfeiture order, the government could take

[16] In the event of a dispute over whether the money constituted drug trafficking proceeds, the government would have the benefit of a rebuttable presumption that it was so obtained if the defendant acquired it during the period of his illegal activities and no other likely source for it appears. 21 U.S.C. § 853(d).

any of his assets of an equivalent value in substitution under § 853(p). And significantly, the government would not be required to trace the substitute assets, that is, the government would not be required to show that the substitute assets were derived from or related in some way to the Jaguar or to the drug dealing. As this hypothetical illustrates, the government has far-reaching forfeiture powers against all of a defendant's property, by virtue of the substitute assets provision, § 853(p).

Consider next what happens when the drug trafficker transfers the Jaguar to a third party, say to his lawyer as recompense for legal services. In this event, the government, under § 853(c), could demand forfeiture of the Jaguar even from the lawyer. Section 853(c) plainly compels transferees of forfeited property to forfeit the transferred property itself. Of course, the lawyer would not have to surrender the Jaguar if she establishes under § 853(n) that she was a bona fide purchaser for value who was reasonably without cause to believe the Jaguar was subject to forfeiture.

But now assume the lawyer had sold or otherwise disposed of the car by the time of the restraining or forfeiture order, and assume further, that this lawyer owned other property including firm assets and bank accounts. This hypothetical situation is essentially similar to the instant case. Covington, a convicted drug trafficker, paid his lawyers, the Law Firm, $103,800 in cash earned from drug trafficking. Had the Law Firm kept the cash intact in its safe, there can be no doubt that it could be required to forfeit the money under § 853(c), just as the lawyer in the hypothetical would have had to give up the Jaguar. After all, by operation of the relation back doctrine, entry of the forfeiture order served to vest title to the Jaguar or the cash in the government, retroactive to the date of the criminal conduct. Like the Jaguar then, the money would have to be forfeited unless the Law Firm could show that it was a bona fide purchaser without cause to believe the money was subject to forfeiture. As

the Law Firm failed to make this showing, it is unmistakably clear that had the Law Firm kept the cash intact, the money would be forfeited. As it happened, of course, the Law Firm did not keep the money intact; it deposited the money in its account and then spent it all, with the exception of $3,695. The central question in this case, then, is whether there is any provision of § 853 that enables the government to reach the Law Firm's assets other than the actual property, $103,800 in cash, received from Covington.

There is a visceral tendency to give a quick affirmative answer to this question. After all, once the forfeiture order issued, title to the $103,800 vested in the government retroactive to the date of Covington's illegal conduct. So, in some sense, the Law Firm never had title to the money and if the Firm spent it, there is a visceral tendency to conclude that the Law Firm should be required to pay it back from the Firm's other assets. Yet, the viscera cannot be allowed to rule for it is crucial to note that the sole issue is whether the statute allows for the forfeiture sought here, not whether it seems fair or sensible to order forfeiture. If the power is not found in the statute, a court should avoid creating one by implication on policy grounds. The Supreme Court has explained why courts must refrain from policy making, however wise, by inventing implied powers to fill statutory lacuna:

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.[17]

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[17] *United States v. Gilman*, 347 U.S. 507, 511-13, 74 S.Ct. 695, 697-98, 98 L.Ed. 898 (1954) (footnote omitted) (holding that

Of course, judges in the common-law tradition frequently and properly "legislate" in the course of deciding cases when they resort to interpretive techniques to fill statutory gaps. But some gaps are chasms too wide to be filled by judges using their common-law powers. These wider gaps, involving more far-reaching and fundamental issues of policy, are more properly suited to the legislative, not the judicial, arena. Judges tempted to make the leap across these chasms must avoid the temptation to do so lest they cross the important, if unclear line that exists between principled but energetic judicial lawmaking and illegitimate usurpation of the legislative role. It must be recognized that the forfeiture laws confer extraordinary powers on the government, and "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." [18] The Law Firm suggests that § 853 contains such an omission, unsuited to judicial repair, in that Congress enacted no provision requiring third parties who transfer or dissipate property subject to forfeiture to forfeit other, substitute property. In response, the government presents several arguments, each of which is separately addressed, seeking to establish that if § 853 does contain a gap, it is a small one, because § 853(c) in some manner requires the Law Firm to forfeit property other than the $103,800 in currency it accepted from Covington.

III

In the broadest conceivable forfeiture statute, a third party, like the lawyer who no longer possesses the Jaguar

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United States could not recover from its employee whose negligent driving resulted in governmental liability under Federal Tort Claims Act, in absence of statutory right of indemnity).

[18] *United States v. Locke*, 471 U.S. 84, 96, 105 S.Ct. at 1785, 1793-94, 85 L.Ed.2d 64 (1985) (finding that courts could not save mining claims filed on December 31 from extinguishment where statute required filing "prior to December 31").

received from the drug trafficker, would be required to forfeit any property of equivalent value, regardless of its connection to the car. This would be the case if § 853(p), the substitute assets provision, applied to third parties as well as to defendants. The government concedes that the statute does not go this far.[19] Such an interpretation of the statute would be untenable for several reasons. In the first place, transferees of forfeited property, such as the Law Firm, have not been convicted of any crime, and thus § 853(c) cannot be read to impose on them the full *in personam* liability of traditional criminal forfeiture. Moreover, the existence of § 853(p) defies such a construction of the statute, for that provision plainly states that it applies only to the defendant. If § 853(c) by itself enables the government to obtain forfeiture with full substitution of assets from a third party, then § 853(p) is a misleading redundancy.[20]

IV

To bridge the gap created by the absence of a § 853(p) applicable to transferees, the government focuses on the fact that the Law Firm received *cash* from Covington. There is, in the government's view, an important distinction between cash and other property under § 853, because all money is fungible and freely interchangeable.

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[19] The government concedes that § 853 does not require forfeiture of non-traceable assets in place of non-cash property dissipated prior to forfeiture. For example, let us assume Covington had paid the Law Firm with tickets to upcoming Washington Redskins' games worth $103,800 (not likely given the team's performance this year). After the season, when the lawyers had used the tickets and the Law Firm possessed no property traceable in any way to the tickets, the government concedes that § 853(c) would not permit the government to seek forfeiture of $103,800 of the Law Firm's other property, say its furniture or business machines.

[20] *See Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112, 111 S.Ct. 2166, 2172, 115 L.Ed.2d 96 (1991) ("[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

This unique feature of cash, according to the government, warrants construing the term "property" in § 853(a) and § 853(c) to mean that where the forfeited property is cash, the forfeiture can reach *any* cash the transferee has.[21] To accommodate this argument, the government asserts that the substitute assets provision in § 853(p) is necessary only in those instances where a defendant has dissipated or transferred crime-related assets other than money. Where the forfeited property is money, the provision merely reiterates what is already inherent in § 853(a) and § 853(c).[22]

The government's fungibility argument, while not without visceral appeal, is ultimately unconvincing, for it is unsupported, if not contradicted, by legislative history, prior precedent, and subsequent legislation. These sources, coupled with an analysis of § 853 as a whole, point persuasively to the conclusion that the only fungible property under § 853 is the defendant's property, whether money or otherwise, because only defendants face *in personam* forfeiture.

Statutory interpretation properly begins with the statute's language. *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981).

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[21] The statutory definition of "property" neither invites, nor precludes this interpretation. 21 U.S.C. § 853(b).

[22] The government posits other explanations for the existence of § 853(p), all in an attempt to show that the provision does not really imply that no such substitution of assets is available when the forfeiture is made by a third party like the Law Firm. Thus, the government has suggested that Congress enacted § 853(p) as an alternative and more expeditious way for the government to seize assets of the defendant that the government could otherwise obtain through the ordinary process of executing the forfeiture judgment. The government also contends that property seized as a substitute asset under § 853(p) can be put to official use, whereas property levied with a writ of execution must be sold. While each of these points may be true, there is simply no basis in the statute's language or legislative history for concluding that Congress had any of these fine distinctions in mind in enacting § 853(p).

Section 853's language does not distinguish between money and other kinds of property. In particular, there is no indication in the language of the substitute assets clause, § 853(p), that it is relevant only to non-cash property. To the contrary, the language of § 853(p) implies that the subsection applies to all property, including money. Thus, the statute provides for forfeiture of substitute assets of the defendant where the criminal proceeds have been "deposited" with a third party or "commingled with other property." 21 U.S.C. § 853(p)(2), (5). Money is the form of property most likely to be deposited or commingled.[23] Rather than distinguishing between money and other property, § 853(p) plainly states that all of the defendant's property is fungible, and the absence of such a provision applicable to third parties invites the inference that the opposite is true for the property of such parties.

Other legislation also contradicts the government's interpretation of § 853 as distinguishing between cash and other property. In 1992, Congress passed a statute which expressly relieves the government of the need to identify or trace fungible property, such as money, in certain civil forfeiture cases. 18 U.S.C. § 984.[24] Section 984, which

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[23] While this does not make the government's interpretation inconceivable, it does force the government to argue that the drafters of the statute chose an extremely opaque way of incorporating the distinction between money and other property into the statute.

[24] The statute provides, in relevant part, that:

(a) This section shall apply to any action for forfeiture brought by the Government in connection with any offense under section 1956, 1957, or 1960 of this title or section 5322 of title 31, United States Code.

(b)(1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or other fungible property—

[Continued]

is plainly premised on money's fungibility, applies only to *in rem* forfeitures related to certain money laundering offenses. That Congress would explicitly employ the fungibility principle in one statute militates against reading it into another statute that makes no explicit mention of fungible assets. Put another way, § 984 shows that Congress, in writing statutes, knows well how to write statutory language that clearly and explicitly makes use of the fungibility of cash. The absence of this language in § 853 strongly implies that the criminal forfeiture statute, unlike its civil counterpart, does not treat cash differently from other property.[25]

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[24] [Continued]

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.

18 U.S.C. § 984.

[25] Another court derived a similar implication from § 984. *See United States v. All Funds Presently on Deposit or Attempted to Be Deposited in Any Accounts Maintained at American Express Bank*, 832 F.Supp. 542 (E.D.N.Y.1993). In that civil forfeiture action pursuant to 18 U.S.C. § 981, the government sought to avoid having to trace commingled forfeited money. Since the case involved money laundering in violation of 18 U.S.C. §§ 1956 and 1957, the new statute on fungible property, § 984, would have relieved the government of any tracing requirement. Yet, in this case, the government was barred from using § 984 by its one-year statute of limitations. 21 U.S.C. § 984(c). The government argued that, even in the absence of § 984, it did not have to trace the property as long as the seized property "facilitated" the wrongdoing. The court rejected this argument because "[t]he clear implication of this statute [§ 984] is that *Banco Cafetero*'s tracing analysis applies to forfeiture actions brought under Section 981; any other reading would render the above provisions superfluous since a provision for substitution would not be necessary if, as the government argues, the accounting techniques put forth in *Banco Cafetero* did not apply to money laundering forfeitures." *All Funds*, 832 F.Supp. at 557.

Nor is § 984 the sole statute demonstrating that Congress does not share the government's interpretation of § 853. In 1986, Congress passed a statute imposing criminal forfeiture as a penalty for a variety of federal crimes. 18 U.S.C. § 982. That statute incorporates by reference certain provisions of § 853, including the substitute assets provision in § 853(p). In 1988, Congress amended § 982, providing that § 853(p) "shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense." 18 U.S.C. § 982(b)(2).[26] This statute renders implausible the government's interpretation of § 853 in this case. Assume a defendant in a money laundering case could show that he was a mere intermediary, and that he no longer possessed "the actual property laundered." In that event, the defendant would not have to forfeit non-cash property, such as his house or car, in lieu of the laundered money, because § 853(p) would not apply. At the same time, if, as the government argues, the fungibility principle should be read into § 853, it should be read into § 982(a)(1) as well.[27] As a result, the defendant, although an intermediary entitled to § 982(b)(2)'s exemption from substitution of assets, would still have to forfeit any money he held, regardless of its source, in place of the laundered money. Section 982's language does not

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[26] Congress amended § 982 again in 1990, adding the following qualifications: "unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period." Pub.L. No. 101-647, § 1403, 104 Stat. 4835.

[27] Section 982(a)(1) provides, in pertinent part, that:

> The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

expressly suggest such a distinction between money and other property, and courts have never mentioned it in discussing the statute. *See United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir.1994); *United States v. Saccoccia*, 823 F.Supp. 994, 1005-06 (D.R.I.1993); *United States v. Floyd*, 814 F.Supp. 1355, 1363-64 (N.D.Tex. 1993). In sum, just as § 982 does not implicitly or explicitly distinguish between money and other types of property, neither does § 853. Neither statute recognizes or makes use of the fungibility of money.

In support of its proposition that all money is fungible under § 853, the government cites a number of cases holding that, even prior to the enactment of § 853(p), a defendant could not avoid forfeiture by simply showing that he no longer had the money earned from crime. *United States v. Robilotto*, 828 F.2d 940, 948-49 (2d Cir.1987); *United States v. Amend*, 791 F.2d 1120, 1127 & n. 6 (4th Cir.), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 353 (1986); *United States v. Ginsburg*, 773 F.2d 798, 800-03 (7th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1985); *United States v. Conner*, 752 F.2d 566, 576-77 (11th Cir.1985), *cert. denied*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985). All of these cases are distinguishable as each involved forfeiture by a convicted defendant, not forfeiture by a third party transferee. Moreover, the cases together confirm that the key distinction within § 853 is not between money and other property, but between the defendant and third parties. While it is true that some of the opinions mention money's fungibility,[28] the decisive factor is the distinctive *in personam* nature of the defendant's liability. The Court of Appeals for the Fourth Circuit succinctly explained why the government

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[28] *See, e.g., Ginsburg*, 773 F.2d at 802 ("Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment, college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes.").

may seize substitute assets of a defendant under criminal forfeiture:

> A RICO forfeiture pursuant to this statute is not an *in rem* proceeding against guilty assets. The forfeiture is, instead, an *in personam* proceeding against the defendant, and the forfeiture constitutes partial punishment for the offense. The government is not required to trace the proceeds of the RICO offense into a specific bank account in order to execute a forfeiture judgment. Instead, a forfeiture money judgment can be satisfied out of any of the defendant's assets.
>
> These principles are embodied in an amendment to the Act, 18 U.S.C. § 1963(m) [the RICO equivalent of § 853(p)], which makes provision for the forfeiture of substitute assets. . . .

In re Billman, 915 F.2d 916, 920 (4th Cir. 1990) (citations omitted), *cert. denied*, 500 U.S. 952, 111 S.Ct. 2258, 114 L.Ed.2d 711 (1991).

The government's theory that all money is fungible has never been applied to a third party, such as the Law Firm, under § 853 or any other criminal forfeiture statute.[20]

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[20] *See* 18 U.S.C. § 982; 18 U.S.C. § 1963. The parties have extensively addressed the case of *United States v. Delco Wire & Cable Co.*, 772 F.Supp. 1511 (E.D.Pa.1991), in which the defendant corporation pled guilty to violating RICO, and the court ordered forfeiture of all property derived from its racketeering activity. The government argued that this included $7.8 million that Delco had paid to Security Pacific Bank under a revolving credit agreement between the date of the indictment and the date of the forfeiture order. The court held that the government had not proven that Delco derived the $7.8 million from racketeering, noting that "[i]n the absence of proof tracing the $7.8 million to illegal activities," the money was not covered by the forfeiture order. *Id.* at 1516. The government was never able to produce such proof. *See United States v. Delco Wire & Cable Co.*, Crim.

Even more telling, the government is unable to cite any instance in which that theory has been applied under a civil forfeiture statute.[30] The government has not explained why, if money is inherently interchangeable, the courts have developed extensive rules for tracing money in civil forfeiture cases.[31] The fungibility theory only appears in criminal forfeiture cases, and only in connection with forfeiture of defendants' property, because only the defendants' property, money or otherwise, is fungible. The limited legislative history regarding § 853(p) supports this understanding of the reasoning behind the statute, for it contains no mention of a distinction between money and other property, but instead reinforces the idea that the defendant is subject to *in personam* criminal forfeiture, and that other parties are not.[32]

Nos. 87-194-01, 87-194-02, 1992 WL 151762 (E.D.Pa. June 23, 1992).

The court in *Delco* never reached the question presented here. It is established in this case that Covington derived the $103,800 from drug trafficking, and consequently that amount is covered by the March 1992 forfeiture order. *Moffitt*, 846 F.Supp. at 468-69. The *Delco* court did not need to consider what would happen if the bank admitted that the $7.8 million was subject to forfeiture, but claimed that it no longer had *that* $7.8 million.

[30] The government's reliance on *Philips Medical Systems International B.V. v. Bruetman*, 8 F.3d 600 (7th Cir.1993), for the proposition that money is fungible in civil forfeiture, is misplaced. The case did not involve a forfeiture of any kind, but merely a default judgment in an ordinary civil action between private parties brought under the RICO statute's private enforcement provisions. *See* 18 U.S.C. § 1964(c).

[31] *See, e.g., United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir.1986).

[32] The substitute assets provision was originally included in the 1984 bill, but was then deleted without explanation, Pub.L. No. 98-473, § 2301(e), 98 Stat. 2192, 2193 (1984), and not enacted until 1986. Pub.L. No. 99-570, § 1153(b), 100 Stat. 3207-13 (1986). The Senate Report on the 1984 bill explained that:

> This provision is new to the law. It provides that where property found to be subject to forfeiture is no longer available at

In sum, the government's primary theory for recovering the entire $103,800 from the Law Firm must fail. In terms of the hypothetical used above, the statute treats money and the Jaguar alike. Section 853(c) cannot be read to contain a general rule that money merits different treatment because it is fungible and interchangeable.[33]

V

In the alternative, the government argues that § 853(g) provides sufficient general authority for a court to order the Law Firm to pay $103,800 now, notwithstanding that

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> the time of conviction, the court is authorized to order the defendant to forfeit substitute assets of equivalent value. This subsection addresses one of the most serious impediments to significant criminal forfeitures. Presently, a defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render his forfeitable property unavailable at the time of conviction.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 201 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3384. Though this passage discusses the identical substitute assets amendment added to the criminal forfeiture section of RICO, 18 U.S.C. § 1963(m), the report indicates that the discussion applies equally to § 853(p). S.Rep. No. 98-225, at 212, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3395.

[33] It must be carefully noted that this opinion concludes solely that § 853 does not rely on money's fungibility. This is not to say that money does not have a distinctive fungible quality, or that money is not treated uniquely, for that reason, in other contexts. For example, this circuit has recently recognized the fungible nature of money in *United States v. Moore*, 27 F.3d 969, 976-77 (4th Cir.1994). There, defendant purchased condominiums with a combination of legitimate and fraudulently obtained funds, and later sold the condominiums, obtaining a check for $37,000 at settlement. Defendant was convicted of engaging in a monetary transaction—depositing the $37,000 check in a federally insured bank—with property, of a value greater than $10,000, derived from bank fraud. 18 U.S.C. § 1957. The court held that it could be presumed under § 1957 "that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity or derived from that activity." *Id.* at 977.

the Law Firm has expended the cash received from Covington. In support of this, the government first reasons that the United States acquired title to the $103,800 under § 853(c)'s "relation back" doctrine, and as a result, the government can recover that amount from the Law Firm in a civil action for conversion under Virginia's common law.[34] Given this, the government contends that this Court has the authority to enter judgment against the Law Firm under a conversion theory by virtue of its power to take actions to "protect the interest of the United States in the property ordered forfeited." 21 U.S.C. § 853(g).[35] The government's argument asks § 853(g) to carry more weight than the statute can bear. Nothing in § 853(g)

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[34] The requisite elements of a conversion claim, or action in detinue, under Virginia law are "(1) plaintiff must have a property interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property is capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time prior to the institution of the act." *York v. Jones*, 717 F.Supp. 421, 427 (E.D.Va.1989). The Supreme Court of Virginia has held that, in such an action, "[i]f the specific property cannot be returned, judgment is rendered for its value." *Broad Street Auto Sales, Inc. v. Baxter*, 230 Va. 1, 334 S.E.2d 293, 294 (1985).

[35] Section 853(g) provides that:

> Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, *or take any other action to protect the interest of the United States in the property ordered forfeited.* Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

21 U.S.C. § 853(g) (emphasis added).

supports the notion that it can serve as a basis for the government to assert a state law claim for conversion. Rather, as its terms make clear, § 853(g)'s function is the more modest one of preserving forfeited property. Section 853(g) contains a list of specific actions, such as requiring bonds or appointing receivers, by which the court may protect property that is already forfeited under the other portions of § 853. This listing, by the *ejusdem generis* rule,[36] confirms that the provision is limited to preserving forfeited property. Nothing in the provision authorizes courts to expand the category of forfeited property beyond what the statute otherwise provides.

Prior decisions involving § 853(g) do not support the government's attempt to use this provision as a basis for asserting a state law conversion claim. While several courts have issued orders based on state law in the context of criminal forfeiture proceedings, those orders merely preserved forfeited property. *United States v. Stazola*, 893 F.2d 34, 39 (3d Cir.1990) (approving order of eviction, based on Pennsylvania law, of tenants in building subject to forfeiture in order to facilitate government's disposition of building); *Braxton v. United States*, 858 F.2d 650, 655 (11th Cir.1988) (approving order that defendant pay "mesne" rents under Florida law to government for reasonable rental value of farm occupied after forfeiture).[37] The cases do not suggest that § 853(g)

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[36] *See United States v. Parker*, 30 F.3d 542, 552-53 (4th Cir. 1994) (holding that canon of *ejurdem generis* prevents counting blacktop as one of "three or more separate apparatus intended for the recreation of children (slides, swingsets, teeterboards, and so forth)" required by statute).

[37] In one unpublished decision, a district court did rely on the RICO section equivalent to § 853(g) to order a third party to return forfeitable property of the defendant. *United States v. Delco Wire & Cable Co.*, Crim. Nos. 87-194-01, 87-194-02, 1991 WL 152937 (E.D.Pa. August 6, 1991). Another opinion in the *Delco* case is discussed above. *See supra* note 29. By this later stage of the *Delco* proceeding, the court had appointed a trustee to collect the defendant corporation's forfeited assets. The trustee

empowers courts to do more than preserve forfeited property.[38]

VI

Finally, the government argues that § 853(c) at least requires the Law Firm to forfeit property that is connected or traceable to the property it received from Covington, the original $103,800. This final argument has merit; unlike the government's other arguments, this argument is firmly grounded in the statutory language.

As described above, § 853(c) expressly applies to "property described in subsection (a)" of § 853. Section 853(a), in turn, requires forfeiture of "property constituting, or derived from" criminal proceeds. Thus, § 853(c), by reference to § 853(a), applies not just to the criminal

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determined that the corporation had a cause of action against the corporation's president, for conversion of corporate funds. The trustee, on behalf of the United States, stepped into Delco's shoes and asserted the conversion claim. The court issued a "turnover order" against the corporation's president for the amount converted.

The Law Firm's situation is unlike that presented in *Delco*. The government is here seeking forfeiture from the Law Firm, as well as Covington. In *Delco*, the defendant corporation was the only party in the case subject to potential forfeiture. The corporation's president was liable to Delco, not under § 1963(c) or § 853(c), but under Pennsylvania law, regardless of whether a RICO offense or forfeiture ever occurred. Naturally, the RICO provisions equivalent to § 853(a), (c), and (p) had no bearing on what the president had to pay. In contrast, the government here is not collecting money that the Law Firm owes to Covington, but is instead seeking forfeiture of property to which it has title under § 853(c)'s "relation back" doctrine. Section 853(a), (c), and (p) therefore define the scope of that forfeiture.

[38] Because this Court does not have authority under § 853 to entertain a conversion claim in the context of this criminal forfeiture, it is unnecessary to decide whether the government could proceed against the Law Firm in a separate action on a conversion theory, or whether, as seems likely, the determination of title under § 853(c)'s "relation back" provision would be binding in such an action.

proceeds themselves but also to property derived from, *i.e.*, traceable to, such property. The hypothetical example already noted illustrates this point. The drug trafficker who accumulates cash by selling cocaine and purchases a Jaguar with the money must forfeit the car as it is property traceable to criminal proceeds. A third party, the drug trafficker's lawyer, who receives the Jaguar, could be required to forfeit the car, for the Jaguar is included within § 853(a) as proporty derived from drug proceeds, and § 853(c) allows forfeiture of property described in § 853(a). Similarly, under a slightly different sequence of events, if the drug trafficker had instead transferred his ill-gotten cash to the lawyer, and the lawyer used the money to purchase the Jaguar, the same result obtains. The car would be subject to forfeiture under § 853(c), for as before, the Jaguar would be property derived from proceeds of the criminal violation. Neither the defendant nor a third party can escape an impending forfeiture order by disposing of forfeitable funds in a transaction that leaves behind property derived from the dissipated funds.

The conclusion drawn from the statutory language, that § 853(c) reaches property derived from criminal proceeds, finds firm support in the fact that the provision would be perilously ineffective if it did not provide for forfeiture of traceable property. If § 853(c) did not reach traceable property in the hands of a third party, then in any case involving a transfer of cash, such as this one, the government would be limited to recovering the precise dollar bills that defendant passed to a third party. In this case, for example, the Law Firm would be free to immunize itself from forfeiture merely by taking the bills to the bank and trading them for fresh currency, or similarly, by depositing the money in its savings account.[39]

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[39] In the leading case on tracing of forfeited property, *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir.1986), the

If § 853(c) did not reach traceable property in the hands of transferees, forfeiture would be defeated as soon as the transferee caused the forfeited money to cross the bank teller's counter. This does not happen because § 853(c), by explicitly incorporating § 853(a)'s definition of forfeited property, reaches property traceable to criminal proceeds.

Not all forfeiture statutes need extend to traceable property. Yet, statutes providing for forfeiture of money must do so, if forfeiture orders are not to be easily circumvented by simply depositing the tainted funds in the nearest bank or commingling the cash with other money. Accordingly, in civil forfeiture statutes, Congress has generally provided expressly for the forfeiture of traceable property in provisions directed at criminal profits.[40] By contrast, Congress has generally declined to require forfeiture of traceable property where the items forfeited are unique tangible property used in crime, such as chemicals,

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court, in discussing how the government may trace money deposited in bank accounts, stated that:

> The first context is the straight-forward situation where a seller of narcotics opens a bank account and deposits into the account only money received from drug sales. The deposited money has been exchanged for a credit. This credit is clearly "traceable proceeds" under the forfeiture statute.

Id. at 1158.

[40] *See* 18 U.S.C. § 981(a)(1)(A)-(D), (F) (civil forfeiture of property traceable to proceeds from various federal offenses including money laundering, drug trafficking in violation of foreign laws, fraud, and auto theft); 18 U.S.C. § 2254(a)(1), (3) (civil forfeiture of property traceable to proceeds from child pornography); 21 U.S.C. § 881(a)(6) (civil forfeiture of property traceable to proceeds from drug trafficking). But Congress has not been completely consistent in including the term "traceable" in every appropriate statute. For a statute providing for forfeiture of money that does not mention traceable property, see 18 U.S.C. § 3681(a) (civil forfeiture by defendant, convicted of violent crime, of proceeds earned under contract relating to movie, book, or television program based on crime).

weapons, or vehicles.[41] This pattern of congressional action further supports the conclusion suggested by the plain language of § 853, namely that § 853(c) authorizes forfeiture of property that is traceable to criminal proceeds ordered to be forfeited.[42]

The question then becomes whether the Law Firm holds any property that is derived from the proceeds of Covington's drug trafficking activities. With the exception of $3,695 remaining in the escrow account, the Law Firm contends that it holds nothing derived from Covington's money. The Law Firm relies on the "intermediate balance rule," developed in the law of trusts and applied in some forfeiture cases, which provides that once tainted funds are withdrawn from an account, subsequent deposits of unrelated funds will not be treated as taking their

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[41] *See* 16 U.S.C. §§ 403h-4, 773h(a), 1437(d)(1), 3374, 3606(c), 5010 (civil forfeiture of vessels and gear used, and resources taken, in violation of environmental laws); 17 U.S.C. § 509(a) (civil forfeiture of materials used in copyright infringement); 18 U.S.C. § 492 (civil forfeiture of counterfeit paraphernalia); 18 U.S.C. § 2254(a)(1)-(2) (civil forfeiture of child pornography and related equipment); 19 U.S.C. § 1609(a) (civil forfeiture of vessels, merchandise, and baggage in violation of customs laws); 21 U.S.C. § 881(a)(1)-(5) (civil forfeiture of drugs and related raw materials, containers, conveyances, and records); 26 U.S.C. § 7302 (civil forfeiture of materials intended for use in violating internal revenue laws); 30 U.S.C. § 1466(a) (civil forfeiture of vessels, cargo, and minerals taken in violation of deep seabed mineral resource laws).

[42] The Law Firm also argues that tracing is inapplicable here because the concept is known only in *in rem* forfeiture, and § 853 is a criminal forfeiture statute. In making this argument, the Law Firm is taking inconsistent positions, as it previously argued the opposite in connection with the fungibility of money argument. In that context, the Law Firm strenuously argued that money is not fungible under § 853(c) because a forfeiture is not *in personam* as to third party transferees. The Law Firm cannot have this both ways, and in any event, this argument cannot override the terms of § 853(c), which plainly incorporate traceability from § 853(a).

place. *See United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir.1986) (applying rule to forfeiture of bank accounts); *In re Columbia Gas Systems Inc.*, 997 F.2d 1039, 1063-64 (3d Cir.1993) (applying rule in bankruptcy context), *cert. denied*, —— U.S. ——, 114 S.Ct. 1050, 127 L.Ed.2d 372 (1994). The sensible principle described in *Banco Cafetero* has been endorsed in a number of subsequent forfeiture cases.[43] In this context, if money presently in an account were deemed traceable to money formerly withdrawn from the same account, when there is no other relation between the two sums of money, this would essentially amount to a rule that all money is fungible, a rule that § 853 cannot be read to contain. *See United States v. Moore*, 27 F.3d 969, 977 (4th Cir.1994) (describing the "accepted, but arbitrary, accounting techniques" of *Banco Cafetero*). Thus, under the lowest intermediate balance rule, with the exception of the escrowed $3,695, the Law Firm's bank accounts contained none of Covington's money after the accounts were emptied in January 1992, which was well before the issuance of the May 1992 restraining order.[44] The remainder of Covington's money, approximately $100,000, was withdrawn from the Law Firm's accounts between August 1991 and January 1992. The government might seek to determine the whereabouts of the withdrawn funds, to identify any property derived from those funds, and to obtain forfeiture of that property. The government has

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[43] *See United States v. All Funds Presently on Deposit or Attempted to Be Deposited in Any Accounts Maintained at American Express Bank*, 832 F.Supp. 542, 551-52 (E.D.N.Y.1993); *United States v. All Funds on Deposit in Great Eastern Bank Account Number 11008117 in the Name of Hadson Toko Trading Co.*, 804 F.Supp. 444, 446 & n. 3 (E.D.N.Y.1992); *United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances*, 786 F. Supp. 1578 (S.D. Fla.1992).

[44] The Law Firm has conceded that the $3,695 remaining in the escrow account constitutes property derived from Covington's drug money.

not indicated whether it believes the Law Firm possesses such property traceable to the withdrawn amounts. As the parties have not yet fully addressed this issue, they will now have the opportunity to do so.

VII

In summary, the following principles emerge from the analysis of § 853 and the decided cases:

(1) The government's forfeiture power against a defendant is extensive. It extends not just to the proceeds of criminal activity, but to all property traceable to such proceeds. Beyond this, it extends even to substitute property, that is, to any of a defendant's property in the event that the actual criminal proceeds or other traceable property have been transferred, consumed, expended, or otherwise disposed of by defendant.

(2) The government's forfeiture power against a third party transferee is significantly less extensive. It extends only to the actual criminal proceeds or any property traceable to such proceeds, and this is so only if the transferee cannot carry the burden of showing that she has a superior interest in the property or is a bona fide purchaser who, at the time of the transfer, was reasonably without cause to believe that the property was subject to forfeiture.

(3) The government's forfeiture power against a third party transferee does not extend to substitute property. Thus, where, as here, a transferee dissipates or disposes of the criminal proceeds prior to the issuance of the forfeiture order, the government cannot compel the transferee to forfeit substitute property.

(4) The nature of cash as a fungible commodity does not alter principles (1) through (3) above.

(5) Section 853(g) permits courts to take limited action to preserve the government's interest in property already forfeited, but it does not permit the government to

pursue a state law claim for conversion to accomplish or achieve a forfeiture.

(6) From (1) through (5), it follows that where, as here, a third party transferee fails under § 853(n) to qualify as a bona fide purchaser reasonably without cause to know of the potential forfeiture, the government can reach only the criminal proceeds themselves, if they are still in the third party's possession, or any of the party's property that may be traceable to the criminal proceeds. Thus, because the Law Firm in this case has already spent the bulk of the actual criminal proceeds, the government is limited to whatever remains, apparently the $3,695 and any other Law Firm property traceable to the criminal proceeds.[45]

Some may lament this result, noting that § 853(c) is, at least in some situations,[46] a weak tool for divesting

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[45] The Law Firm also contends that the equities in this case weigh in its favor, and that the government's delay in initiating the forfeiture should bear against recovery of property from the Law Firm. This is not a discretionary matter; it is a matter of what the forfeiture statute allows. To the extent that equitable considerations might play a role, they would not weigh against the government. As indicated in the factual account at the outset of this opinion, the government's failure to obtain a restraining order before May 1992 was largely due to the fact that the Law Firm did not disclose its transactions with Covington.

[46] It is worth noting that once a restraining order or forfeiture order has been entered, the statute effectively prevents the defendant or a third party from dissipating criminal proceeds. In its chief decisions regarding criminal forfeiture and attorneys' fees, the Supreme Court considered whether defendants could transfer forfeitable assets to attorneys *after* the entry of restraining orders pursuant to § 853(e). *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 620, 109 S.Ct. 2646, 2649, 105 L.Ed.2d 528 (1989) (defendant paid attorney $25,000 in violation of restraining order); *United States v. Monsanto*, 491 U.S. 600, 604, 109 S.Ct. 2657, 2661, 105 L.Ed.2d 512 (1989) (defendant moved to vacate restraining order to permit use of frozen assets to retain attorney). Where an attorney accepts payment in violation of such a restraining order, the government can recover regardless of the fact that the attorney has dissipated the funds.

third parties of property received from criminal defendants.[47] But Congress did not enact § 853(c) in order to divest third parties of property, but did so instead as a backstop to § 853(a), to ensure that the defendant could not escape his punishment. The legislative history of § 853(c) explains that Congress enacted § 853(c) in direct response to its concern that the criminal forfeiture statutes "fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." S.Rep. No. 98-225, 98th Cong., 2d Sess. 195, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3378. The Senate Report repeatedly emphasizes that § 853(c) is a measure "setting out clear authority for voiding improper pre-conviction transfers of assets" in order "to assure that [the defendant] cannot as a result avoid the economic impact of forfeiture." *Id.* at 196-97.[48] Thus, the purpose of § 853 has never been to

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[47] In its previous opinion in this matter, this Court recognized that attorneys "have a duty to make inquiries" when on notice that a client's funds may be subject to forfeiture. *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F.Supp. 463, 477 (E.D.Va.1994), *appeal dismissed*, No. 94-5167 (4th Cir. June 28, 1994). The conclusions reached in the present opinion reveal an avenue around the attorney's duty. Under § 853 as presently enacted, an attorney can accept fees from a client, money that the attorney overwhelmingly suspects was earned in drug trading, but avoid any forfeiture, by simply ensuring that the fees are promptly spent. As long as this remains possible under the statute, the attorney's duty to investigate the source of fees is significantly undercut.

[48] The Senate Report repeatedly states the purpose of § 853(c):

> [Section 853(c)] is a codification of the "taint" theory which has long been recognized in forfeiture cases. Under this theory, forfeiture relates back to the time of the acts which give rise to the forfeiture. The interest of the United States in the property is to vest at that time, and is not necessarily extinguished simply because the defendant subsequently transfers his interest to another. Absent application of this principle a *defendant could attempt to avoid criminal forfeiture* by transferring his property to another person prior to conviction.
>
> The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loop-

punish third parties, even those who accept assets from the defendant with cause to believe they are subject to forfeiture. As recently as 1984, in fact, the statute had no application whatsoever to third parties. Congress could have created a more comprehensive scheme for penalizing those who do business with drug dealers simply by making § 853(p) applicable to third parties transferees. And, while the Supreme Court has recognized that "there is a strong governmental interest in obtaining full recovery of all forfeitable assets." *Caplin & Drysdale, Chartered, v. United States*, 491 U.S. 617, 631, 109 S.Ct. 2646, 2655, 105 L.Ed.2d 528 (1989), this is beside the point, because "[t]he short answer is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989) (quoting *United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 2081-82, 60 L.Ed.2d 624

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hole in current law whereby *the criminal forfeiture sanction could be avoided* by transfers that were not "arms' length" transactions....

Under this provision, the jury could render a special verdict of forfeiture with respect to property used or acquired by the defendant in a manner rendering it subject to forfeiture, irrespective of the fact that it may have been transferred to a third party subsequent to the acts of the defendant giving rise to the forfeiture. Resolution of claims of third parties asserting that they are innocent *bona fide* purchasers, claims that will determine whether a transfer is ultimately voided, may be reserved for the post-trial ancillary hearing. This procedure provides for more orderly consideration both of the forfeiture issue and the legitimacy of third party claims. Moreover, even if a transfer is sustained at the ancillary hearing, the fact that the jury will have determined that the property would have been forfeitable if it had remained in the hands of the defendant will allow the court to order the forfeiture of substitute assets of the defendant as provided in [§ 853(p)], *to assure that the defendant does not retain the gain received from his pre-conviction transfer.*

S.Rep. No. 98-225, at 200-01, 1984 U.S.C.C.A.N. 3383, 3384. (footnotes omitted) (emphasis added).

(1979)). Of course, Congress may remedy this whenever it sees fit to do so.[49]

An appropriate order shall issue.

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[49] This opinion determines solely the extent to which the Law Firm is subject to forfeiture under 21 U.S.C. § 853, taking no position as to whether the government might have another remedy, whether by a conversion action under state law, or under a different theory.

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

No. 93-0006-A

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

Feb. 22, 1994

MEMORANDUM OPINION [1]

ELLIS, District Judge.

I.

Under what circumstances are the fees paid to an attorney by an accused drug trafficker subject to criminal forfeiture?

This is the general and quite significant question presented in this 21 U.S.C. § 853(n) criminal forfeiture proceeding. In essence, William Covington ("Covington"), facing indictment for various drug trafficking offenses, paid the law firm of Moffitt, Zwerling and Kemler, P.C. ("the Law Firm") $103,800 to retain the services of its experienced and well-known criminal defense lawyers. Thereafter, Covington was indicted and subsequently pled guilty to several drug trafficking offenses. Pursuant to the plea agreement, the Court entered an order forfeiting various properties Covington admitted were derived from his drug trafficking activities. These properties included certain real property, Covington's auto service business, various firearms and cash, including

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[1] Revised pursuant to Order dated February 22, 1994.

the cash paid to the Law Firm. Seeking to defeat forfeiture of its fee, the Law Firm filed a petition pursuant to 21 U.S.C. § 853(n)(2), claiming that it was, in effect, a bona fide purchaser for value of the fee and that at the time the fee was received, the Law Firm was "reasonably without cause to believe that the property [*i.e.*, the cash fee] was subject to [criminal] forfeiture. . . ." 21 U.S.C. § 853(n)(6)(B). This Memorandum Opinion considers and disposes of the issues raised by the Law Firm's petition.

II.

A. Chronological Summary

Beginning as early as 1985 and continuing to mid-1992, Covington organized and led a cocaine and marijuana distribution operation in northern Virginia. Over the life of the conspiracy approximately 100 kilograms of cocaine and 1000 pounds of marijuana were distributed.[2] By 1990, Covington was the subject of a grand jury investigation. In the course of this investigation, the government seized for forfeiture a number of Covington's assets alleged to be drug-related. More specifically, the seized assets, worth hundreds of thousands of dollars, included Covington's home,[3] four cars, $238,000 cash (largely in $100 bills), a boat and several certificates of deposit. These seizures, it appears, prompted Covington to retain the law firm of Phililps, Beckwith and Hall. Yet, neither Covington nor this law firm contested the seizures and, as a result, many of the pieces of property, excluding the home and the cash, were forfeited administratively without protest.

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[2] Cocaine, not marijuana, was the conspiracy's principal focus. Marijuana distribution efforts and profits were small compared to those associated with cocaine.

[3] Although the home was seized in 1990, Covington was allowed to remain living there for some period.

In July 1991, additional seizures of Covington's drug-related assets occurred pursuant to a new series of search and seizure warrants obtained by the government in connection with the grand jury investigation. The seized assets on this occasion included more cash, jewelry worth thouands of dollars and a motorcycle, as well as two tow trucks and two business bank accounts, the latter items being the remaining assets of Covington's auto service business.

In August 1991, shortly after this second series of seizures, and perhaps spurred by them and his growing dissatisfaction with the Phillips, Beckwith and Hall firm, Covington moved to retain the Law Firm to act as his counsel. In this connection, Covington paid the Law Firm a total of $103,800 in cash, $17,000 of which was received and accepted by the Law Firm on August 23, 1991 and the remaining $86,800 the following day. These cash transfers are the focus of this proceeding; their details and circumstances are more fully described after the complete chronological factual picture is painted.

Once on board in August 1991, the Law Firm argued successfully for delaying the indictment, then imminent, so that plea negotiations might be pursued and to enable Covington to be hospitalized for treatment of mental depression and related problems. These plea negotiations failed, and on October 30, 1991, Covington and a number of other individuals were indicted on a variety of drug trafficking, firearms and money laundering charges. Following the indictment, several individuals, including a major drug customer of Covington's [4], began to cooperate with the government. This customer identified Covington's main supplier in Florida and provided evidence suggesting that Covington had paid the Law Firm with drug trafficking profits. As a result of this and other new information, a superseding indictment was returned in January 1992. Both this indictment and the original included

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[4] William "Junior" Atkinson.

a forfeiture count,[5] which noted that one of the forfeited assets was $168,000 in currency, representing cocaine profits not yet accounted for by the ongoing investigation.

In February 1992, government agents stepped up efforts to ascertain whether the sums paid the Law Firm were drug trafficking proceeds. In this connection, IRS Currency Transaction Reports ("CTR") filed by the Law Firm were examined and found to reflect deposits of $17,000 and $86,000 into the Law Firm's account on the dates the cooperating witness had said the tainted money was paid by Covington to the Law Firm.[6] But because these forms did not identify the source of the money,[7] there was as yet no conclusive evidence to establish that Covington was the source of the money. To pursue this point, the government sought and obtained search warrants for the Law Firm's accounts relating to these de-

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[5] This forfeiture count provided, in pertinent part, as follows:

> Pursuant to Title 21, United States Code, Section 853(a), the defendants shall forfeit to the United States of America any and all properties constituting, or derived from, proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy and any properties used, or intended to be used by the defendants in any manner or part, to commit, or to facilitate the commission of such violation.

[6] I.R.S. "Form 8300s" require that any person who, in the course of business, receives cash receipts of over $10,000 to identify the person from whom the cash was received, identify the agent conducting the transaction, and disclose the nature of the transaction. *See United States v. Leventhal*, 961 F.2d 936, 937-38 (11th Cir. 1992).

[7] The Law Firm elected not to list Covington's name on the forms as the source of the cash on the grounds that to do so would infringe the attorney-client privilege and Covington's Fifth Amendment privilege. Although the Fourth Circuit has not yet decided the issue, two circuits have held that law firms must disclose the client's name as the source of the cash on the Form 8300. *See United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir.1992); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir.1991).

posits. Again, the records searched confirmed the $103,800 deposit, but not the source of the money.

Contemporaneously with the bank search warrants, the government served subpoenas *duces tecum* on both Phillips, Beckwith & Hall and the Law Firm.[8] The Law Firm moved to quash the subpoena on the grounds that enforcement would (i) impermissibly interfere with an accused's right and opportunity to retain counsel and (ii) improperly tip in the government's favor the delicate balance of power between the prosecution and the defense. Another judge of this division granted the motion to quash the subpoena on the ground that the subpoena chilled Covington's right to retain effective counsel. The government appealed and the case was stayed pending the appeal.[9]

Up to this time, March 1992, the Assistant United States Attorneys prosecuting the criminal case, including the forfeiture, had not obtained the requisite permissions from the U.S. Attorney and the Assistant Attorney General to forfeit the fees paid to the Law Firm. By early May 1992, these permissions had been obtained and the government then filed a bill of particulars identifying the $103,800 paid to the Law Firm as an item subject to forfeiture under the indictment. Shortly thereafter, the government also sought and obtained this Court's Order restraining the Law Firm from disbursing the $103,800 in fees it received from Covington.

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[8] The Assistant United States Attorney then in charge of the prosecution also wrote the Law Firm at this time, *inter alia* asserting that the omission of the payee's name from the Form 8300 was a criminal offense under 26 U.S.C. §§ 6050I, 7203. The government later voluntarily withdrew this letter in open court in response to the Law Firm's vehement objection.

[9] This appeal was ultimately dismissed as moot by the Court of Appeals, apparently on the assumption that the Law Firm intended voluntarily to supply enough of the requested information to satisfy the government. Disputes over whether this occurred are immaterial to the resolution of the question at bar.

The next event of significance occurred in July 1992, when the government advised the Court and the Law Firm that Covington, then in pre-trial detention at Alexandria Detention Center, had sent word through another inmate housed at the Center that he, Covington, wished to plead guilty but the Law Firm would not let him do so because, ostensibly, it would reflect poorly on the Law Firm. In its pleading reporting this event, the government suggested that a conflict of interest now existed between Covington and the Law Firm. In response, the Law Firm sought dismissal of the indictment on the ground of government misconduct, including a violation of Covington's Sixth Amendment rights. Following two hearings, the Court ruled that a conflict existed, requiring the withdrawal of the Law Firm as Covington's counsel.[10] The Court then appointed new counsel[11] with directions to review the pending motion to dismiss the indictment and advise the Court whether Covington wished to (i) pursue the pending motions, (ii) file new or additional motions or (iii) follow some other course. New counsel, after reviewing the record and consulting at length with Covington, filed no new motions, nor did it pursue the pending motion. Instead, Covington pled guilty to three counts of the indictment, specifically a drug conspiracy in violation of 21 U.S.C. § 846, money laundering offense in violation of 18 U.S.C. § 1956, and a firearms offense in violation of 18 U.S.C. § 924(c). Covington was subsequently sentenced to 262 months incarceration to be fol-

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[10] *See Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (where a constitutional right to counsel exists, Sixth Amendment jurisprudence holds that there is a correlative right to a conflicts free representation); *cf. United States v. Pryba*, 674 F.Supp. 1502 (E.D.Va.1987).

[11] Because of the breadth and scope of the Covington conspiracy, many experienced Northern Virginia defense attorneys already represented persons with some connection to the case. As a result, the Court found it necessary to appoint experienced District of Columbia counsel for Covington.

lowed by five (5) years of supervised release and a total of $150 in special assessments.[12]

Pursuant to the plea agreement, a consent order of forfeiture was entered at the time of sentencing, forfeiting, under 21 U.S.C. § 853 and 18 U.S.C. § 982, virtually all of Covington's assets, including cash, real estate, the auto service business and various firearms.[13] The Court then entered an order forfeiting the $103,800 fee paid to the Law Firm, which forfeiture was explicitly conditioned on the rights of third parties to claim an interest in the money by filing a petition pursuant to 21 U.S.C. § 853 (n). Notice was appropriately published and the Law Firm filed a petition claiming the $103,800. Specifically, the Law Firm claimed that it received the money as a bona fide purchaser at a time when it was reasonably without cause to believe that the money was subject to forfeiture as drug trafficking proceeds.[14] A two day evidentiary hearing was held on the Law Firm's petition. Among the witnesses who testified at the hearing were Covington and several of his co-conspirators on behalf of the government and, on behalf of the Law Firm, two of its named partners plus another, former Covington attorney.

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[12] More specifically, Covington received 202 months imprisonment on the drug conspiracy count and 60 months on the money laundering and firearms counts, with the terms of the conspiracy count and laundering count to run concurrently with each other and the firearms term to run consecutively to the other two counts. No Rule 35, Fed.R.Crim.P., motion has yet been filed, although it appeared that Covington had been actively cooperating.

[13] The remainder of Covington's property covered in the indictment's forfeiture count had previously been administratively forfeited.

[14] The Law Firm also sought to preclude forfeiture of the fee on the ground of prosecutorial misconduct. The Court, after considering the parties' briefs and oral arguments, denied this motion, finding no prosecutorial misconduct.

B. The Source of the $103,800 Fee

The hearing record compels the conclusion that the $103,800 in cash paid to the Law Firm constituted the proceeds from Covington's drug trafficking activities. There was simply no credible or persuasive evidence to the contrary. Covington repeatedly and convincingly testified that the $103,800 he paid to the Law Firm was directly derived from his drug distribution activities.[15] He also testified, more specifically, that the $17,000 he paid the Law Firm on August 23 was virtually all drug proceeds obtained from five named cocaine customers. The small amount of remaining cash in the $17,000 came from his seized business, which the evidence convincingly showed was subsidized by cocaine profits, used to launder his cocaine profits, and used to facilitate the distribution

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[15] Given the record as a whole, the Court finds this testimony credible and persuasive, notwithstanding that Covington is alleged to have made a contrary statement to a Law Firm partner and another lawyer while he, Covington, was a patient at St. Elizabeth's Hospital. Testimony concerning this alleged prior inconsistent statement came from Henry Asbill, a lawyer called in on the case by Law Firm partners when concerns about a conflict were raised. Yet, on close scrutiny, there is substantial doubt that Covington made the statement. First, while Asbill kept notes of the conversation, the notes make no mention of the statement. Further, the Law Firm partner made no reference to the statement in his testimony and while he may not have bene asked a question precisely calling for disclosure of the statement, it seems likely that it would have been considered sufficiently material to merit mention in the course of the partner's direct examination. Covington, for his part, claims he never discussed with Asbill, whom he did not trust, or with anyone, whether the fee was paid with drug trafficking proceeds. Quite apart from a substantial doubt that the statement was made, it is plausible, as the government argues, that Covington, if he made the statement, was referring to buried and hence literally dirty money and not to drug proceeds. Finally, even if Covington made the statement, which is unlikely, it would not be persuasive. All of the other relevant evidence leaves no reasonable doubt that the $103,800 constituted drug trafficking proceeds.

of drugs.[16] Thus, there is no reasonable doubt that the $17,000 payment, shown by the bank's CTR to have consisted of $3000 in $100 bills and $14,000 in smaller bills, was "property constituting, or derived from" Covington's illicit drug trafficking. 21 U.S.C. § 853(a)(1) (1993).

The same conclusion is compelled with respect to the $86,800 payment made on August 24. Like the $17,000 payment, this payment was made in cash and specifically in bills of $100 or less. According to the bank's CTR, the payment consisted of $85,800 in $100 bills plus $1000 in smaller bills. The source of this money is worth recounting. In May 1990, when the government seized $238,000 in cash from his safety deposit box, Covington feared authorities would soon search his house and seize money he kept there. Accordingly, he took $100,000 in drug proceeds he had in the house, placed it in a Safeway bag and buried the bag under some leaves by the side of a road. Three months later he retrieved the money, finding it somewhat discolored by mositure and damaged by insects. With the help of various co-conspirators, Covington managed to clean some of the bills and exchange others for new bills. In May 1991, Covington again buried approximately $60,000 to $80,000, $30,000 of which consisted of crisp, new $100 bills Covington had obtained from a confederate in exchange for the damaged and discolored bills. An additional $30,000 or so, also in bills of $100 or less, came from a co-conspirator as payment for drugs. Stung by experience, Covington buried this money in two three-inch PVC pipes. On August 24, 1991, he retrieved this money and put it in a Ritz cracker box to transport it to the Law Firm to pay the $100,000 fee the Law Firm required to take his case. And because the disinterred money added to the $17,000

[16] Because Covington was himself a drug abuser and devoted most of his time to distributing drugs, there came a time when the expenditures in his auto service business exceeded the receipts. He funded this deficit with drug proceeds and paid his employees with these proceeds.

previously paid was not enough to cover the $100,000 fee, Covington on August 24 collected an additional (approximately) $32,000 in drug debts from a customer,[17] who then helped him count the money. The disinterred drug money, plus the collected drug debts totaled $86,800 in drug proceeds, which was then given to the Law Firm on August 24. Although the total payments made on August 23 and 24 exceeded the required $100,000 up front retainer, the Law Firm told Covington it would retain the additional $3800 as an advance on expenses.

In sum, the credible record points convincingly, if not conclusively, to the conclusion that the $103,800 paid to the Law Firm constituted proceeds from Covington's drug trafficking activities.[18]

C. The Law Firm's Meetings with Covington

There were three early meetings between Covington and the Law Firm. These meetings are material to the question whether the Law Firm was "reasonably without cause to believe that the [$103,800] was subject to forfeiture" under § 853(n)(6). Each is therefore separately treated.

The first meeting occurred on August 22 when Covington visited the Law Firm's offices in the company of a co-conspirator who had received a grand jury subpoena. In the course of the meeting, it was decided that the Law

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[17] This customer, William "Junior" Atkinson, provided credible corroborating testimony on these matters at the hearing.

[18] Additional evidence supporting this conclusion includes Covington's testimony that by 1990, he had lost all the legitimate money he had accumulated prior to becoming a drug dealer. This resulted from a variety of causes, including theft by a girlfriend of $130,000, his house purchase, and the government seizures. By 1991, according to Covington, he was broke. His depressed financial state, he related, caused him to change the way he did his drug business. In the past, he claimed he had typically paid cash for drugs. Indeed, he claims he was known as "cash Paul." But by 1991, he was broke and had to be "fronted" the drugs.

Firm would represent Covington and that the co-conspirator would be referred to another attorney. The co-conspirator then departed and the meeting continued with just Covington and the Law Firm partners present.

In the course of this lengthy meeting, Covington told Law Firm partners that he had been a cocaine distributor since 1986,[19] that he had used his business to facilitate his drug trafficking and that the government,[20] in a series of two seizures, had seized essentially everything he owned.[21] Significantly, Covington disclosed that he was continuing, even then, to sell drugs because, as he put it, "he was broke."[22] At one point in the session, Covington became emotional, declared he had nothing left to live for and revealed a history of mental problems coupled with long-term drug and alcohol abuse.

By either the end of the meeting or early the next day, the Law Firm partners had told Covington that a $100,000 retainer would be required for them to undertake the representation. They also told Covington that cash would be acceptable and that the Law Firm would omit Coving-

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[19] Covington falsely told the Law Firm partners he had distributed no more than 15 kilograms of cocaine over the life of the conspiracy. But by the end of the third meeting, the Law Firm partners had ample reason to regard this statement with skepticism. Indeed, the Law Firm partners noted that skepticism in this regard was one reason they required a relatively high advance payment on the fee.

[20] Covington did tell the Law Firm partners that he had earned legitimate money in the car repair business, but he also told them that the business assets, including two tow trucks, had been seized.

[21] Covington disclosed that a girlfriend had stolen $130,000 from him, which sum, he said, included $70,000 in legitimately acquired funds. He also reported that a divorce and child support payments had played a role in depleting his assets, even prior to the seizures.

[22] The Law Firm partners correctly advised Covington that he would have to cease his drug trafficking activities immediately if he wanted Law Firm representation. Covington confirmed that Law Firm partners were adamant on this point.

ton's name from the requisite Form 8300, based on the attorney-client privilege. One of the partners recalls telling Covington that the Law Firm could not accept "funny money", but does not contend that this term was defined or explained. And, for his part, Covington testified there was never any discussion concerning prohibited sources for the fee money.

The second meeting between Law Firm counsel and Covington took place the next day; it was at this meeting that Covington handed over $17,000 in cash. The bills, held together by a rubber band, were not examined by the Law Firm partner who received them. When offered a receipt, Covington declined, fearing, he said, that it would fall into FBI hands. The Law Firm then kept the receipt. The partners did not ask Covington any questions concerning the source of the cash.

After the second meeting on August 23, but before the third meeting on August 24, the Law Firm's partners met with the prosecutors to discuss the case. At this meeting, the partners persuaded the prosecutors to postpone the indictment to allow Covington to check into a mental health facility and to pursue plea negotiations. Also, the prosecutors then gave the partners an overview of the case against Covington, as well as a list of seized assets. In discussing their case, the prosecutors described Covington's business as a sham operation used to launder drug proceeds. When the partners protested that the government had improperly seized legitimate assets, the prosecutors disclosed that an IRS net worth investigation had confirmed that all the assets seized were drug-related. There was no discussion of attorney's fees at this meeting.

It was at the third meeting between the Law Firm partners and Covington, on August 24, that Covington delivered to one of the partners a box containing the $86,800 in cash. As previously noted, the money was mostly in $100 bills with the remainder in smaller bills, all of which was banded together with scotch tape or

rubber bands in $10,000 bundles. The Law Firm partner signed a receipt, but, as with the receipt for the $17,000 payment, the Law Firm retained it at Covington's request. Again, as in the case of the earlier payment, the Law Firm partners did not ask Covington any questions concerning the source of the $86,800. Nor did the partners ask Covington whether he still had any unseized legitimate assets of any kind, any money other than drug money, or any source of legitimate income.

D. Subsequent Events

Less than a week after the August 24 meeting, the Law Firm partners met a second time with the prosecutors. On this occasion, the Law Firm partners were afforded the opportunity to read the lengthy affidavit filed in support of the search and seizure warrants. Among other things, the affidavit detailed the government's financial investigation that concluded that Covington had spent or accumulated over $400,000 in the past few years and that these funds could only have come from his drug trafficking activities. Significantly, the affidavit also recited that Covington's accountant stated that Covington's auto business could not possibly have legitimately earned substantially more than the modest income reported to the IRS.[28] When told that Covington had spent or accumulated over $400,000 in the past few years, the accountant stated there was no way the money could have been derived from Covington's auto repair business. Finally, the affidavit also confirmed, as the partners had already been told, that Covington's legitimate businesses and bank accounts had been used to facilitate his illicit drug distribution activities.

Also within a week of the August 24 meeting, Law Firm partners met with Covington's previous lawyers from

[28] Covington's auto service business corporate tax returns for fiscal years 1982 through 1989 reflected total taxable income of $5,267.

Phillips, Beckwith and Hall. At this meeting lawyers from the Phillips firm discussed the matter with the Law Firm Partners and gave them their Covington case file. This file included a draft petition for return of Covington's house, as well as several witness interviews.

III.

A threshold question is whether law firm fees are subject to forfeiture under § 853. The Law Firm repeatedly argues here that § 853 should not be read to reach attorneys' fees lest defendants' Fifth and Sixth Amendment rights be abridged. While this argument is not without some weight, it has been clearly rejected by Congress and the courts. To begin with, the clear and unambiguous language of § 853 and its legislative history "provide[s] no basis for concluding that attorneys' fees are not subject to forfeiture," *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 641 (4th Cir.1988) (*en banc*), *aff'd sub nom. Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).[24] To the contrary, as the Fourth Circuit and the Supreme Court held, § 853 reaches all forfeitable assets of a defendant, "without regard to whether he intends to use them to pay an attorney". *Caplin & Drysdale*, 837 F.2d at 641. The section exempts only those third party recipients of a defendant's assets "who have prior claims or are bona fide purchasers, without regard to whether they are attorneys." *Id.* And, as the Fourth Circuit further concluded, allowing § 853 to reach funds used to pay attorneys' fees "will have no effect on the basic and absolute Sixth Amendment right" to counsel. *Id.* at 643. While the right to counsel in certain circum-

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[24] Worth noting is that one of the Law Firm partners involved in the Covington representation was thoroughly familiar with the *Caplin & Drysdale* litigation, having represented Leon D. Harvey, a defendant whose appeal was consolidated with that of the Caplin and Drysdale law firm.

stances is absolute, the right to counsel of choice is qualified; it "belongs only to those with legitimate assets." *Id.* at 645. There is no absolute right under the Constitution "to retain counsel of choice with illegally acquired assets." *Id.* at 646.[25]

In sum, the Law Firm cannot reargue here the important Constitutional and policy questions already resolved in *Caplin & Drysdale*. Section 853 unquestionably reaches tainted assets used to retain counsel or pay legal fees.

Nor is it persuasive to argue, as the Law Firm does, that *Caplin & Drysdale* stands for the proposition that attorneys acquire cause to believe that fees may be subject to forfeiture only through notice in an indictment. According to the Law Firm, since this indictment did not specifically list legal fees, there was no reason to believe the fees were subject to forfeiture. This argument is flatly wrong; it is neither supported nor invited by *Caplin & Drysdale* or § 853.[26] To the contrary, fees received prior to indictment are subject to forfeiture where the other

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[25] *See also United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir.1991) (Sixth Amendment does not guarantee a client the right to choose a particular lawyer); *In re Grand Jury Subpoena Served upon John Doe*, 781 F.2d 238, 250-51 (2d Cir.1986) (*en banc*) (noting that "[c]riminal defendants have been constitutionally required to retain other counsel when the need to preserve the highest ethical standards of professional responsibility outweighs the accused's . . ." usual prerogative to choose counsel), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).

[26] To accept this meritless argument would result in carving out a special forfeiture exemption available only to lawyers, *i.e.*, fees are not subject to forfeiture absent formal notice from the government in the indictment. There is no caselaw or statutory warrant for such an exemption, which, if it existed, would be subject to abuse. Conceivably, attorneys might seek to delay an indictment to allow time to collect and commingle a fee. That did not occur here, however, as the Law Firm sought and won a delay in the issuance of the indictment for different and legitimate reasons.

requirements of § 853 are met. At most, in circumstances other than those at bar, the absence of notice in an indictment may be one factor among many for courts to consider and weigh in determining whether an attorney was reasonable in believing that the fees were derived from legitimate sources and hence not subject to forfeiture.

IV.

The Law Firm's petition is based on § 853(n)(6)(B). To prevail on its petition, therefore, the Law Firm must establish by a preponderance of the evidence (i) that it was a bona fide purchaser for value of the $103,800 and (ii) that at the time of purchase, it was "reasonably without cause to believe" that the money constituted or was derived from Covington's drug trafficking activities. 21 U.S.C. § 853(n)(6)(B). The government concedes that the Law Firm provided legal services to Covington and therefore was a "purchaser for value." Thus, the central question presented is whether the Law Firm was reasonably without cause to believe that the $103,800 in cash received from Covington was subject to forfeiture. In deciding this question, "the proper test to be applied under the statute is not merely whether the petitioner had knowledge of the forfeitability of the asset but whether the petitioner reasonably held the belief that the property was not subject to forfeiture." *United States v. Reckmeyer*, 836 F.2d 200, 204 (4th Cir.1987). And this standard, significantly, is objective, not subjective. In other words, a genuinely-held belief that property is not subject to forfeiture is unavailing unless that belief was objectively reasonable in the circumstances.

Measured by this standard, the Law Firm's petition fails. The evidence does not preponderate in favor of the Law Firm's claim that it reasonably believed the cash fee, when it was received,[27] was paid out of legitimately

[27] In general, it seems appropriate to assess whether there exists reasonable cause to believe a fee payment is subject to forfeiture

derived funds that Covington had "squirreled away" over the years. To the contrary, the record, taken as a whole, compels the conclusion that the Law Firm's belief that the cash fee came from legitimate sources was not reasonable in the circumstances. Indeed, in the circumstances, this belief was at best a hope, and a forlorn one at that.

Myriad facts, most of which are essentially uncontroverted,[28] support this conclusion. Among the most significant are the following:

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at the time a fee is earned. Until then the payment does not belong to the attorney. In Virginia a specified sum paid at the time of employment of the attorney to secure the lawyers' legal services for a specific matter is deemed to be an advanced legal fee which has been entrusted to the lawyer, and as such is rightfully deemed the property of the client. Virginia State Bar Opinion 1322, Feb. 27, 1990. A client may always discharge his attorney and, in that event, the fee is limited to a reasonable fee for actual services rendered upon a *quantum meruit* basis, regardless of any contract to the contrary. *Heinzman v. Fine, Fine, Legum & Fine*, 217 Va. 958, 234 S.E.2d 282, 286 (1977), *cited in* Virginia State Bar Opinion 1246, June 1, 1989. *See, e.g., In the Matter of Cooperman*, 187 A.D.2d 56, 591 N.Y.S.2d 855 (1993), (The use of a "non-refundable fee" retainer is unethical and violative of an attorney's obligations under the Code of Professional Responsibility to refund unearned fees upon discharge.).

Thus, contrary to the Law Firm's contention, the fee was not fully earned at the time of payment. Even so, in the circumstances at bar, it is appropriate, chiefly for two reasons, to assess the reasonableness of the Law Firm's belief on August 24, essentially the time of receipt. First, the facts and circumstances known to the Law Firm after its early meetings with Covington and the prosecutors serve only to strengthen the case against the reasonableness of the Law Firm's belief regarding the source of the money. And second, significant complexities attend determining precisely when various portions of advance fee payments were earned. In other cases, the effort to make such a determination may be necessary, but it is not necessary here.

[28] Virtually all the facts relied on in reaching this conclusion were essentially undisputed. The Court did not find that any witness knowingly testified falsely; all of the witnesses were credible. While there were some conflicts in the testimony, those conflicts

(a) In late August 1991, after meeting twice with Covington and once with the prosecutors, the Law Firm knew that for approximately a year a federal grand jury investigation had targeted Covington as the leader of a major cocaine distribution organization and that the government, in a series of seizures, had seized for forfeiture Covington's home, his business, his business assets and accounts, his boat, his cars, and approximately $240,000 in cash. The Law Firm further knew that these seizures were based on a judicial officer's finding of probable cause to believe the assets were subject to forfeiture.

(b) The Law Firm further knew that in addition to these seizures, Covington claimed that a girlfriend had stolen $130,000 in cash from him, $70,000 of which he claimed were legitimately-made funds.

(c) Covington told the Law Firm that he was a long-term drug and alcohol abuser, that his only legitimate employment and business was as an auto mechanic operating an auto repair shop, that he had used his business to facilitate his drug dealings, that he was divorced and making child support payments and that as a result of the divorce, the government seizures and the theft of his money, he was now broke, which was why he was continuing, even then, to sell drugs.

(d) Covington told the Law Firm he could only pay in cash, which he did, mostly in $100 bills with

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were likely attributable to the variability and fallibility of human memory, not to intentional falsehoods. Not infrequently, different people innocently remember events differently. The fact that the witnesses were credible combined with the fact that the few testimonial conflicts were frequently immaterial, led the Court to conclude that no witness deliberately testified falsely. An example of an inconsequential conflict is that Covington testified that he delivered the $86,800 in cash in a Ritz cracker box, whereas a Law Firm partner recalled a shoe box.

the remainder in smaller bills. The seventeen thousand dollars had come from his pocket and the $86,800 was delivered in a box containing taped or banded $10,000 bundles.[29]

(e) Covington refused receipts for the cash, fearing they would fall into FBI hands.

(f) The Law Firm learned from the prosecutors and the seizure affidavit that a government net worth investigation had accounted for all of Covington's legitimate income and concluded that all the assets seized were drug-related.[30]

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[29] The Law Firm's acceptance of this large amount of cash is especially significant in light of the following statement from the Fourth Circuit's *en banc* opinion in *Caplin & Drysdale*:

> [I]f a defendant has any uncontested assets, the attorney should be able to satisfy himself that he is paid out of these assets with little difficulty, and thus have no fear of fee forfeiture. *On the other hand,* where an attorney chooses to accept payment in assets named in a forfeiture indictment *or a huge cash sum,* any later attempts to avoid knowledge would be insufficient to qualify the attorney as a bona fide purchaser.

In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 647 (4th Cir.1988), *en banc* (emphasis added), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

[30] The Law Firm's claim that the affidavit supported an inference they drew that Covington had squirreled away as much as $300,000 per year in legitimate funds from his automobile businesses is flatly wrong. The affidavit, to the contrary, forecloses such an inference. In any event, the Law Firm knew the business had been used to facilitate the drug trafficking and hence it knew that legitimate funds generated by the business since then were also subject to forfeiture. Because the government's right to the business relates back to the time the business was used to facilitate a drug offense (or involved in money laundering), the government is legally entitled to all the gains thereafter accruing from the business. *See United States v. Bucuvalas,* 970 F.2d 937, 946-48 (1st Cir.1992) (indicating, in the context of a § 1963 forfeiture, that

Quite apart from what the Law Firm knew, there is that which it chose not to know. Thus, the Law Firm partners did not ask Covington directly and pointedly to identify the source of the funds.[31] Nor did they inquire what, if any, legitimate sources of funds Covington had. None of the reasons adduced to explain these omissions are persuasive to convert the Law Firm's view as to the money's source from a forlorn hope to a reasonable belief. In these circumstances, especially where large sums of cash are involved,[32] failure to make a direct inquiry

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the government is entitled to interest), *cert. denied*, —— U.S. ——, 113 S.Ct. 1382, 122 L.Ed.2d 758 (1993).

It is true, as the Law Firm points out, that property traceable to income generated by a business before its use to facilitate a drug offense is not subject to forfeiture. *See United States v. Borromeo*, 995 F.2d 23, 25 (4th Cir.), *reaff'd in part, vacated in part and remanded*, 1 F.3d 219 (1993). But there was simply no reasonable basis for the Law Firm to have reasonably believed that the business had accumulated $100,000 in pre-drug profits that Covington had "squirreled away" out of "reverence for old money."

[31] Interestingly, one of the Law Firm partners noted that had Covington gone to a bank to convert the cash to a cashier's check he would likely have faced the bank's inquiries as to the source of the funds. This observation begs the question whether the Law Firm should have been satisfied with less.

[32] Courts have frequently remarked on the fact the large sums of cash and drugs frequently go together. Thus, even without the presence of drugs or drug paraphernalia, "carrying a large sum of cash is strong evidence that the property was exchanged for or intended to be exchanged for drugs," and that $2,500 in cash "is substantially greater than is commonly kept in residential premises by law-abiding wage earners." *United States v. $95,945.18 in U.S. Currency*, 913 F.2d 1106, 1111 (4th Cir.1990), *quoting United States v. $215,300 in Currency*, 882 F.2d 417, 419 (9th Cir.1989), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3242, 111 L.Ed.2d 752 (1990); and *United States v. $2,500 in U.S. Currency*, 689 F.2d 10, 16 (2d Cir.1982), *cert. denied sub nom. Aponte v. United States*, 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984). *See also United States v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir.), *cert. denied sub nom. Willis v. United States*, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984) (the extremely large amount

may be tantamount to wilful blindness, which would invite the inference that an adverse answer would have been given had the question been asked.[33] Thus, when confronted with circumstances essentially similar to those at bar attorneys should inform prospective clients that they cannot pay fees with drug proceeds and that such proceeds are subject to forfeiture, even in the attorney's hands.[34] If the prospective client answers that the money comes from legitimate sources, attorneys should take whatever further steps or ask whatever further questions may

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of money found is itself strong evidence that the money was furnished or intended to be furnished for drugs); *United States v. Thomas*, 913 F.2d 1111, 1115 (4th Cir.1990) (citations omitted) ("[T]he possession of unusually large amounts of cash . . . or the making of uncommonly large cash purchases . . . may be circumstantial evidence of drug trafficking."); *United States v. $25,055.00*, 728 F.Supp. 1406, 1408-09. (E.D.Mo.1990) ("The large quantity of money involved infers a linkage to drug trafficking.").

[33] *Cf. United States v. Campbell*, 977 F.2d 854 (4th Cir.1992) (Willful blindness may warrant inference of knowledge; whether real-estate agent, who ignored tell-tale signs, including the flashing of large sums of cash, was wilfully blind created a jury issue as to agent's guilty knowledge that client was drug dealer and cash constituted drug proceeds) *cert. denied* —— U.S. ——, 113 S.Ct. 1331, 122 L.Ed.2d 716 (1993).

[34] For an example of the perils of attorneys accepting fruits of a crime, *see Cf. In re Ryder*, 263 F.Supp. 360 (E.D.Va.1967) (Attorney who took possession of money and a weapon, learning that the money was taken in the course of an armed robbery in which the weapon was used, was suspended from practice in federal court for eighteen months; suspension might have been permanent had the attorney not sought advice of other lawyers and professors.), *aff'd*, 381 F.2d 713 (4th Cir.). The Law Firm apparently tried to do something like this when a partner informed Covington that the Law Firm could not accept "funny money." But this term was not defined and the partner was apparently neither clear nor explicit as to what the statement meant. In circumstances like those at bar, it is important to be clear and explicit, as Covington considered that he was not being asked directly what the source of the money was because, as he put it, the Law Firm did not want to know the answer.

be suggested by the circumstances to satisfy themselves that it is objectively reasonable to believe the answer. To be sure, attorneys are not required to conduct thorough financial investigations of clients before they can accept fees. Rather, they must ask sufficient direct questions and take whatever further steps the client's answers might indicate to ensure that a belief that the funds are legitimate is objectively reasonable. No precise formula exists to define the appropriate inquiry in all circumstances. Each situation may be different. The polestar is that the attorney's belief must be objectively reasonable. In the circumstances at bar, a direct question concerning the source of these funds would almost certainly have elicited a response that would have precluded acceptance of the money or a response that on further questioning would simply not have been reasonably believable.

The Law Firm argues that its petition should be granted as a matter of law because the Department of Justice ("DOJ") Guidelines in effect at the time indicated that the government would refrain from seeking forfeiture of legal fees absent actual knowledge of forfeitability on the part of an attorney.[35] The Law Firm further argues that even if the Guidelines do not compel a Law Firm victory as a matter of law, the existence of the Guidelines which was known to Law Firm partners, added to the prosecutors' failure to advise the partners in their August 23 meeting that fees would be subject to forfeiture, are factors that establish the reasonableness of the Law Firm partners' belief that the cash fee came from legitimate sources and was not subject to forfeiture. Neither argu-

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[35] Specifically, the Guidelines provided as follows:

> Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a criminal matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, where there are reasonable grounds to believe that the attorney had actual knowledge that the asset was subject to forfeiture at the time of the transfer.

ment scores; both miss the mark. The issue is not whether the Law Firm reasonably believed DOJ would seek forfeiture, but rather whether the Law Firm partners reasonably believed the cash fee was subject to forfeiture. On this latter question, the *Caplin & Drysdale* opinions, also well-known to the Law Firm partners, make clear that actual attorney knowledge of the illegitimacy of the fee source is not the standard. Indeed, the Guidelines themselves confirm that they do not establish any legal standard:

> These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

Because the Guidelines do not establish the governing forfeiture standard and indeed explicitly warn against reliance for that purpose, they are of no avail to the Law Firm either to prevail as a matter of law or to buttress the claimed reasonableness of the Law Firm's belief that the fee was not subject to forfeiture.

The prosecutors' silence on fee forfeiture at the August 23 meeting is also unhelpful to the Law Firm. The prosecutors had no legal obligation to raise the issue at the meeting. Their silence on the matter was at best ambiguous. Any inference that the Law Firm partners drew from this silence deserves the label of tenuous or strained. In any event, any such inference is dwarfed by the mass of evidence available to the Law Firm partners in August 1991 that pointed convincingly to the conclusion that the cash fee constituted, or was derived from, drug trafficking proceeds.

Similarly unavailing to the Law Firm is the fact that the indictment, when issued, did not specifically list the

fee as subject to forfeiture. Yet, Rule 7(c) Fed.R.Crim.P. "does not . . . require that the indictment describe each item subject to forfeiture. This can be done in a bill of particulars." *United States v. Raimondo*, 721 F.2d 476, 477-78 (4th Cir.1983), *cert. denied sub nom. Bello v. United States*, 469 U.S. 837, 105 S.Ct. 133, 83 L.Ed.2d 74 (1984) quoting from *United States v. Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir.1980)[36] Precisely this was done here. The forfeiture count in this indictment described the property subject to forfeiture in general terms that encompassed the fee even though the fee was not included in the non-inclusive listing of specific assets. And thereafter, a bill of particulars was filed specifically listing the fee. In any event, the indictment had not yet issued when the Law Firm accepted the $103,800 cash fee.[37] This is the time at which the reasonableness of the Law Firm's belief must be assessed.[38] And the central finding of this memorandum opinion is that, at this time, the facts and circumstances known to the Law Firm precluded a reasonable belief in the legitimacy of the cash used to pay the fee.

V.

As supporting authority for its position, the Law Firm cites three recent Supreme Court decisions: (1) *Alexander v. United States*, —— U.S. ——, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); (2) *Austin v. United States*,

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[36] *See also United States v. Amend*, 791 F.2d 1120 (4th Cir.1986) (emphasizing that an indictment need not describe each item subject to forfeiture), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 353 (1986); *United States v. Rupley*, 706 F.Supp. 751, 754 (D.Nev.1989) (where the indictment makes defendant aware that all profits from criminal enterprise are potentially forfeitable, "[t]he Government should not be foreclosed from seeking forfeiture of all property subject to penalty, simply because it listed some items with particularity").

[37] As already noted, fees paid prior to indictment are not immune from forfeiture. *See supra* Part III.

[38] *See supra* n. 26.

—— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); (3) *United States v. 92 Buena Vista Ave.*, —— U.S. ——, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993) (plurality opinion). None of these cases is apposite here; none supports the Law Firm's position.

Alexander simply held that criminal forfeiture of an entire business used to distribute obscene material was subject to the Excessive Fines Clause of the Eighth Amendment. *Alexander*, —— U.S. at ——, 113 S.Ct. at 2776. And *Austin* held that the Excessive Fines Clause of the Eighth Amendment applied to the civil forfeiture of property alleged to have facilitated a felony drug offense. *Austin*, —— U.S. at ——, 113 S.Ct. at 2812. This result followed from the ruling that forfeiture pursuant to the civil forfeiture provisions in issue, 21 U.S.C. § 881(a)(4) and (a)(7), constituted punishment of the owners of such property. *Id.*, —— U.S. at ——-——, at 2810-12. Both *Austin* and *Alexander* are inapposite because unlike the properties there in issue, the $103,800 in issue here, as well as the bulk of the property Covington forfeited administratively and judicially, constituted proceeds of drug trafficking. In these circumstances a forfeiture cannot be excessive. It is self-evident that a forfeiture of all the funds constituting or derived from drug trafficking cannot rationally be termed excessive. Put another way, a forfeiture is in no sense excessive where, as here, it merely divests a defendant of the money and other assets derived from an illegal activity. In any event, the record here confirms that Covington's forfeitures were not excessive. He derived between $1,000,000 and $2,000,000 in profits from his drug trafficking activities, whereas the total amount forfeited was less than $1,000,000.

Like *Alexander* and *Austin*, *Buena Vista* involved civil forfeiture under 21 U.S.C. § 881. Specifically at issue was real property that a drug dealer bought with drug proceeds and then gave to his girlfriend, a putative "innocent owner." *92 Buena Vista Ave.*, —— U.S. at ——,

113 S.Ct. at 1130. At the heart of *Buena Vista* was the simmering tension between the "innocent owner" defense and the "relation back" doctrine, both of which appear in the civil forfeiture statute. *See* 21 U.S.C. § 881(a)(6) and (h) (1993).

The "relation back" doctrine provides that title to forfeitable property vests in the government at the time of the commission of the offense warranting forfeiture. *See 92 Buena Vista Ave.*, —— U.S. at ——, 113 S.Ct. at 1135. Given this, a wrongdoer cannot pass title to forfeitable property because that title would already have vested in the government.[30] At odds with this, it appears, is the "innocent owner" defense, which provides that no property may be forfeited where the owner was without knowledge of the wrongdoing giving rise to forfeiture. *Id.*, —— U.S. at ——-——, 113 S.Ct. at 1134-37. Faced with the conflict between these provisions, the Supreme Court in *Buena Vista* held that the "innocent owner" defense arguably trumps the "relation back" doctrine. More specifically, the plurality opinion held that a claimant is entitled to assert an "innocent owner" defense before the government can invoke the "relation back" doctrine. *Id.*, —— U.S. at ——, 113 S.Ct. at 1137. In the context of that case, the ruling meant that a donee of real property purchased by the donor with drug proceeds might defeat forfeiture by showing she was an innocent owner.

Buena Vista, a civil forfeiture decision, is of no use to the Law Firm in this criminal forfeiture matter. Concurring in *Buena Vista*, Justice Scalia explicitly recognized the differences between the civil and criminal forfeiture schemes. *92 Buena Vista Ave.*, —— U.S. at ——, 113

[30] Vesting is not automatic; "nothing vests in the government until some legal step shall be taken for the assertion of its rights, after which, for many purposes, the doctrine of relation carries back the title of to the commission of the offense." *92 Buena Vista Ave.*, —— U.S. at ——, 113 S.Ct. at 1135, quoting from *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51, 2 L.Ed. 459 (1806).

S.Ct. at 1141.[40] And in any event, to the extent that § 853(n)(6)(B) is the criminal forfeiture analog to the "innocent owner" defense, the Law Firm, as this opinion concludes, cannot establish the defense. Had the Law Firm established the reasonableness of its belief under § 853(n)(6)(B), it would have prevailed despite the "relation back" doctrine codified in § 853(c).[41] Since it did not do so, § 853(c) operated here to require forfeiture of the cash fee.[42]

VI.

In summary, this memorandum opinion concludes that whether an attorney is reasonably without cause to believe that a fee payment is subject to forfeiture depends on the facts and circumstances of each case and that in this case the Law Firm fell far short of proving by a preponderance of the evidence that, at the time the $103,800 cash fee was received, the Law Firm was reasonably without cause to believe that the money was subject to forfeiture.

In reaching this conclusion, the Court is not unmindful of the considerable difficulties criminal defense attor-

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[40] These differences were also noted in the Third Circuit opinion affirmed in *Buena Vista*. *See United States v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Ave., Rumson, N.J.*, 937 F.2d 98 (3rd Cir.1991).

[41] Section 853(c) provides that:

> Any such property [*i.e.*, property derived from drug trafficking or used to facilitate such activities] that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States . . .

[42] As the Fourth Circuit put it, "[a]pplication of this [§ 853(c)] to fees paid to an attorney prior to a conviction results in forfeiture of the fees, because the government's interest in the property predates the transfer to the lawyer." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 640 (4th Cir.1988), *en banc, aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617[, 109 S.Ct. 2646, 105 L.Ed.2d 528] (1989).

neys face as they carry out their day-to-day duties in the trenches of the criminal justice system. Nor is the Court unmindful of the vital role able defense counsel, retained and appointed,[43] play in giving effect to the Bill of Rights' fundamental guarantees and in ensuring that the innocent are never convicted. Given their vital roles, able defense counsel should not be unnecessarily discouraged from entering the criminal justice fray. This memorandum opinion and the result it reaches do not do so. Instead, apart from the result reached on the specific facts at bar, the modest teaching of this memorandum opinion is that under certain circumstances attorneys are on notice that a fee payment may be subject to forfeiture and that in those circumstances, attorneys have a duty to make inquiries. The scope of this duty is determined by the circumstances. The circumstances at bar, especially the use of large sums of cash in relatively small bills, required that the Law Firm partners inquire directly of Covington as to the source of the money. This is not a heavy burden. If Covington had responded truthfully, then the Law Firm would have been compelled to decline the fee payment and of course would also have been at liberty to accept or decline the representation. There is no constitutional right to retain counsel of choice with drug proceeds. Had the Law Firm declined the representation, Covington, who had no legitimately derived funds, would have received appointed counsel, a constitutionally adequate result and in fact, the result that ultimately occurred. On the other hand, if Covington had falsely claimed that the source of the cash was legitimate, further questioning by the Law Firm partners would doubtless have disclosed this falsehood, given the circumstances. This result should not unduly discourage able defense attorneys, for it should come as no surprise to them that they, too, like everyone else in society, cannot accept drug proceeds in payment for goods or services

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[43] In this Division, private criminal defense attorneys frequently accept appointed representations, as well as paid representations.

unless they are reasonably without cause to believe that the funds are not drug proceeds.

In the final analysis, therefore, the modest teaching of the result reached here is that attorneys have no special or privileged status when it comes to criminal forfeiture pursuant to § 853; rather, they are subject to the provisions of that section in the same manner as everyone else in society.

The Clerk shall send copies of this Memorandum Opinion to counsel of record and to the law firm of Moffitt, Zwerling and Kemler.

APPENDIX C

[Filed Feb. 17, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Misc. No. 93-0006-A
[Civ. Action No. 94-1384-A]

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

ORDER

This matter comes before the Court on the government's request for further discovery.

For the reasons stated from the bench, the request is DENIED.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
February 17, 1995

[Filed Feb. 17, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Misc. No. 93-0006-A
[Civ. Action No. 94-1384-A]

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

ORDER

This matter comes before the Court for a final order of forfeiture pursuant to 21 U.S.C. § 853(c).

For the reasons stated from the bench, the Court ORDERS that:

(i) Moffitt, Zwerling & Kemler, P.C. must forfeit the following property to the United States:

(a) $3,695.95, representing the amount that remained in the Law Firm's escrow account on behalf of William Covington on May 12, 1992;

(b) $1,445.97, representing loan repayment deductions taken from William Moffitt's salary during the period from April 8, 1992 to May 12, 1992;

(c) $12,980.66, representing loan repayment deductions taken from William Moffitt's salary after May 12, 1992;

(d) the September 26, 1991 note executed by William Moffitt, in favor of Moffitt, Zwerling & Kemler, P.C.;

* * * *

[Filed Feb. 17, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 94-1384-A
[Misc. No. 93-006-A]

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOFFITT, ZWERLING & KEMLER, P.C.,
Defendant.

ORDER

This matter comes before the Court for a final order following the Court's memorandum opinion of February 10, 1995, which indicated that defendant's motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., would be granted.

Accordingly, the Court ORDERS that:

(i) defendant's motion to dismiss is GRANTED and the case is closed; and

(ii) this case is consolidated with the proceeding styled *In re Moffitt, Zwerling & Kemler, P.C.*, Misc. No. 93-0006-A, for purposes of appeal.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
February 17, 1995

[Filed Jan. 19, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Misc. No. 93-0006-A

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

ORDER

This matter is before the Court on a number of discovery disputes arising from the government's tracing of forfeitable property held by Moffitt, Zwerling & Kemler, P.C. (the "Law Firm").

For the reasons stated in the Court's memorandum opinion of January 19, 1995, the Court ORDERS that:

(i) the Law Firm shall provide the government with further explanation of the nature of the expenditures shown on the redacted operating account ledger, sufficient to enable the government to determine whether the Law Firm or its partners obtained forfeitable property as a result of the payments, but the Law Firm need not disclose the identity of the payees;

(ii) The Law Firm shall respond to the following interrogatories regarding salary payments to William Moffitt and John Zwerling:

1. Whether, between August 27, 1991 and April 8, 1992, any asset still in existence on May 12, 1992 was purchased by or on a partner's behalf for a price in excess of $1,000 utilizing funds derived from the Law Firm's operating account or savings account.

2. Whether, between August 27, 1991 and April 8, 1992, periodic payments toward the purchase of

property (including mortgage or loan payments) were made by or on a partner's behalf utilizing funds derived from the Law Firm's operating account or savings account, which payments total in excess of $1,000 over that period.

3. Whether, between August 27, 1991 and April 8, 1992, any money in excess of $1,000, derived from funds in the Law Firm's operating account or savings account, was transferred to an account or location where it remained intact on May 12, 1992.

4. Whether, between August 27, 1991 and April 8, 1992, money derived from the Law Firm's operating account or savings account was deposited in a bank account whose lowest intermediate balance between the date of deposit and May 12, 1992 was greater than $1,000.

(iii) the Law Firm shall provide the government with information and records regarding the terms and schedule of William Moffitt's loan and its repayment;

(iv) the Law Firm and/or William Moffitt shall provide the government with information and records sufficient to explain the disposition of the $25,000 Moffitt borrowed;

(v) the Law Firm shall provide the government with information regarding the nature and terms of its payments with respect to photocopiers, including the loan with which Zwerling's predecessor firm purchased a photocopier, and the lease under which the Law Firm exercised a purchase option privilege;

(vi) the Law Firm shall provide the government with information and records sufficient to establish whether, between August 27, 1991 and April 8, 1992, any asset still in existence on May 12, 1992 was purchased with the credit cards for a price in excess of $1,000;

(vii) the Law Firm shall provide the government with information and records sufficient to enable the government

to determine whether traceable, forfeitable property arose from the expenditures made from the Law Firm's escrow account on William Covington's behalf;

(viii) the Law Firm, William Moffitt, and John Zwerling shall provide the government with tax information and records establishing each partners' total tax withholding for the tax years in question, the amount of tax withholding paid from the Law Firm's operating account during the relevant time periods, and the amount of tax refund received;

(ix) the government shall submit a thorough and precise description of the property it believes is subject to forfeiture under 21 U.S.C. § 853, along with an accompanying memorandum containing the government's reasoning as to why the property is forfeitable, by 5:00 p.m. on Friday, February 3, 1995; and

(x) the Law Firm shall submit its response by 5:00 p.m. on Friday, February 10, 1995.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
January 19, 1995

[Filed Feb. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Misc. 93-0006-A

IN RE MOFFITT, ZWERLING & KEMLER, P.C.

ORDER

For the reasons stated in the Memorandum Opinion dated February 3, 1994, the petition is DISMISSED with prejudice.

The government is ORDERED to submit a proposed final order of forfeiture by the close of business on Monday, February 28, 1994.

The Clerk is directed to send a copy of this Order to counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Va.
February 22, 1994

[Filed June 15, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-00425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON

ORDER

This matter comes before the Court on the motion of Moffitt, Zwerling & Kemler, P.C. (the "law firm"), to compel discovery in connection with the law firm's claim of interest in forfeited property. In addition, in the Government's opposition to the law firm's motion, the Government proposes discovery it desires to take against the law firm. The Court will construe this proposal as a cross-motion to compel discovery.

For the reasons that follow, the law firm's motion and the Government's cross-motion are both GRANTED IN PART and DENIED IN PART.

The court possesses inherent power to authorize discovery in connection with a criminal forfeiture hearing. *See United States v. Porcelli,* 1992 U.S. Dist. LEXIS 17298 (E.D.N.Y. 1992). Nevertheless, discovery in this matter will be limited to those matters potentially relevant and probative toward establishing whether the forfeiture order is applicable to the disputed sum of money. The Court rejects the Government's argument that the only issue legitimately before the Court is whether the

law firm was a *bona fide* recipient of funds from the defendant Covington—that is, that the law firm accepted its retainer without knowledge that the funds were subject to forfeiture. Instead, as the Fourth Circuit held in *United States v. Reckmeyer,* 836 F.2d 200, 206 (4th Cir. 1987), an interested third party has a due process right to attack the validity of an underlying criminal forfeiture order. Accordingly, the law firm may legitimately raise arguments that (1) the forfeited property is not validly within the scope of the offense for which Covington was convicted, and (2) the forfeiture violates the Double Jeopardy Clause, the Excessive Fines Clause, or the forfeiture statute's prohibition on multiple forfeitures of the same property.

The Court will permit focused discovery of materials pertinent to these arguments. Accordingly, the Court GRANTS the law firm's motion to compel discovery of:

> (1) Copies of any statements by Covington in the Government's possession concerning: (a) whether the monies he paid to the law firm were the proceeds of criminal activity; (b) the law firm's knowledge of the origin of those monies; and (c) any aspect of the legal representation provided him by the law firm;
>
> (2) An accounting that lists the value of all assets of any description that have been forfeited, civilly (including administratively) or criminally, by Covington, on the basis of their having been the proceeds of, or derived from the crimes of which he was convicted in the Eastern District of Virginia, Crim. No. 91-425-A;
>
> (3) Copies of all final orders of criminal or civil (including administrative) forfeiture respecting the assets described in the preceding paragraph;
>
> (4) An accounting that lists the value of all assets of any description that were stolen from Coving-

ton and that were also the proceeds of, or derived from, the crimes of which Covington was convicted in the Eastern District of Virginia. Crim. No. 91-425-A;

(5) The accounting of Covington's legitimate versus illegitimate income prepared jointly by the Internal Revenue Service and the Federal Bureau of Investigation.

Two categories of requested documents are conceivably relevant to the arguments listed above, but will nevertheless not be included in the documents that the Government is compelled to produce. First, the law firm has requested Covington's presentence report. While this document might possibly contain relevant information, the Court finds that this likelihood is not sufficiently strong to overcome the privileged nature of the document. Moreover, because the presentence report is, in substantial measure, derived from the government's records, any relevant information contained in the presentence report is likely to be found in the documents ordered produced.[1] Second, the law firm has requested: "Any documents or other materials in [the Government's] possession that are relevant to the law firm's interest in property subject to the above-referenced order of forfeiture." This request is excessively broad, vague, and unduly burdensome. Accordingly, the law firm's motion to compel discovery of these two categories of documents is DENIED.

The remaining categories of requested documents are relevant solely to the law firm's argument that the forfeiture order should be avoided because of prosecutorial misconduct. The Court need not, and does not, decide whether, as the law firm contends, the Supreme Court's opinion in *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989), indicates that prosecutorial

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[1] Obviously, nothing in this Order prevents Covington from voluntarily providing the law firm with *his* copy of the presentence report.

abuse could be grounds for invalidating an otherwise valid forfeiture order. Assuming, *arguendo*, that it is, the Court, after extensive review of the record, concludes that there is no factual predicate for asserting a claim of prosecutorial abuse.[2] Accordingly, the Court DENIES the law

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[2] In supplemental briefing ordered by the Court, and filed May 21, 1993, the law firm raised ten separate allegations of prosecutorial abuse: (1) irregularities in connection with the serving of a trial subpoena on the law firm for its fee records; (2) threatened prosecution of the principals of the law firm for tax offenses; (3) failing to notify the Court of a search warrant executed against the law firm's bank records; (4) making misrepresentations to the Court at the hearing to quash the trial subpoena; (5) institution of a retaliatory forfeiture effort against the law firm; (6) making misrepresentations to the Court in pursuit of the forfeiture; (7) filing a materially misleading document with the Court; (8) filing an incredible explanation with the Court for the filing of the materially misleading document; (9) eliciting a statement from Covington at the jail through the use of an informant, in violation of Covington's constitutional rights; and (10) harassing the law firm in connection with its representation of another client. Another judge of this division has already addressed the law firm's first two claims of prosecutorial abuse, finding that the Government's actions did not amount to misconduct. *See* Transcript of Hearing, March 13, 1992, at 67-68 (Bryan, J.). The law firm contends that Judge Bryan's comments were *dicta*, and therefore cannot be considered binding law of the case. Without deciding that issue, the Court's independent review of the record accords with Judge Bryan's finding that, while the prosecutors' actions were not faultless, they do not rise to the level of misconduct. With respect to the law firm's other allegations, the Court finds no evidence of misconduct. The Court is persuaded that none of the actions of the prosecutors in this case were motivated by any animus against the law firm or, indeed, by any concern other than a dedication to the vigorous pursuit of their responsibilities. In particular, nothing in the record indicates to the Court that any Government action was taken with the intent, or for the purpose, of coercing a guilty plea.

Notwithstanding this ruling, there are certain aspects of the Government's handling of this litigation that, with the benefit of hindsight, should have been handled differently. First, although the Court accepts the Government's explanation for the filing of this misleading document, obviously, greater attention must be paid to the accuracy of the submissions made to the Court. More

firm's motion to compel discovery of these remaining categories of documents.

With respect to the Government's cross-motion to compel discovery, the Court GRANTS the motion to the extent it seeks:

> Copies of any writings or recordings of any kind whatsoever, *pertaining to the payment of Covington's attorney's fees*,[3] which writings or recordings were made by any member, employee or agent of the law firm during meetings with Covington.

Such material is clearly relevant to the issue of whether the law firm had a good faith belief that the funds its

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troubling is the Government's representation to Judge Bryan, in the hearing regarding the law firm's motion to quash the subpoena for fee information, that the Government had not instituted forfeiture proceedings against the law firm. In light of the fact that the prosecutors had initiated informal contacts with the Department of Justice regarding authorization of just such a forfeiture proceeding, this representation, while technically true, was also misleading. The Court understands that the prosecutors felt bound by internal regulations, drafted with the input of the defense bar, not to divulge their intentions to defense counsel. Nevertheless, the Government must not underestimate the degree to which the integrity of our criminal justice system depends on the ability of the Court to rely, without reservation, on the absolute veracity of the representations made by every officer of the Court. Under the circumstances, the Government should have made some effort, perhaps by *ex parte* letter to the Court, to advise the Court that the Government's representation, while technically true, might also have been misleading. Nevertheless, the Court notes that the law firm was not prejudiced by the Government's action. An accurate representation to the Court, that the Government was contemplating forfeiture proceedings against the law firm, would have actually *aided* the Government in its argument against quashing the subpoena. For this reason, and because the Government's representation was technically true, the Court finds that this incident did not comprise prosecutorial misconduct.

[3] This clause, not included by the Government in its discovery request, is added by the Court to appropriately narrow the scope of the permitted discovery.

received from Covington were not forfeitable property. Covington has waived his attorney client privilege with respect to these materials. The remainder of the Government's discovery request is DENIED as excessively broad and unduly burdensome.

Both parties have leave to renew their request for discovery of specific documents upon a showing of good cause.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
June 15, 1993

[Filed Aug. 13, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON, *et al.*

ORDER

This matter came before the Court for a hearing on whether defendant waives any conflict of interest with Moffitt, Zwerling & Kemler, P.C. ("the law firm").

After speaking with defendant at the bench, without counsel present, the Court found that, even if defendant desired to waive any conflict with the law firm, no such waiver could be accepted because a potential or actual conflict exists that cannot be waived. *See Wheat v. United States*, 486 U.S, 153 (1988).

Accordingly, the Court relieves the law firm from its obligation to represent defendant further in this case.

As defendant is now indigent, the Court APPOINTS Douglas J. Behr as defendant's counsel of record.[1]

The Court further sets the following briefing schedule:

1) Counsel for defendant shall, by 5:00 p.m., Monday, September 21, 1992, (i) file any further pre-trial motions,

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[1] The Court also appoints Ms. Susan Anthony to assist Mr. Behr in the representation of defendant.

if necessary, and (ii) indicate which previously filed motions, now under advisement, the defendant intends to pursue, if any.

2) Counsel for the law firm shall, by 5:00 p.m., Monday, September 21, 1992, indicate which previously filed motions, now under advisement, the law firm intends to pursue, if any.

3) The government shall respond to defendant's motions and the law firm's motions by 5:00 p.m., October 2, 1992.

4) Should further oral argument be necessary after reviewing the parties' submissions, the Court will schedule a hearing.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
August 13, 1992

[Filed Mar. 13, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON,
Defendant.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motions to quash the trial subpoenas issued to the law firm of Moffitt, Zwerling and Kemler and the law firm of Phillips, Beckwith and Hall are granted.

2. The motion of defense counsel to order withdrawal of the letter from an Assistant United States Attorney is denied as moot, the Office of the United States Attorney agreeing voluntarily to withdraw the letter.

3. The motion to quash the trial subpoena issued to Nashua Brookside Hospital is denied without prejudice, however, to counsel's right to object on relevancy or hearsay grounds as to the admission of the two documents discussed during the hearing.

4. The motion of the defendant William Paul Covington for leave to intervene is granted.

5. The motion of the National Association of Criminal Defense Lawyers to appear as amicus curiae is granted.

/s/ Albert V. Bryan Jr.
United States District Judge

Alexandria, Virginia
March 13th, 1992

APPENDIX D

[Filed June 4, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1884(L)
95-1916
MISC-93-6-A
CA-94-1384-A

UNITED STATES OF AMERICA
v. *Plaintiff-Appellant*

MOFFITT, ZWERLING & KEMLER, P.C.
Defendant-Appellee

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA;
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Amici Curiae

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The appellee/cross appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. AS no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

AS the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX E

STATUTE INVOLVED

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property de-

scribed in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event

of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take

any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without

regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(Pub. L. 91-513, title II, § 413, as added and amended Pub. L. 98-473, title II, §§ 303, 2301(d)-(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub. L. 99-570, title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207-13, 3207-54.)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON
a/k/a "Mr. Paul"
(Counts 1, 2-59), *et al.*

OCTOBER 1991 TERM—at Alexandria

INDICTMENT

* * * *

FORFEITURES WITH RESPECT TO COUNT 1

Pursuant to Title 21, United States Code, Section 853(a), the defendants shall forfeit to the United States of America any and all properties constituting, or derived from, proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy and any properties used, or intended to be used by the defendants' in any manner or part, to commit, or to facilitate the commission of such violation. These assets include, but are not limited to, the following:

1. Any and all interest of WILLIAM PAUL COVINGTON in a parcel of real estate including residence, appurtenances, and improvements located at 7671 Fallwood Way, Lorton, Virginia.

2. Any and all interest of WILLIAM PAUL COVINGTON in Paul's Auto Service, Inc., including all accounts and assets.

3. Any and all interest of LINDA DIANE KERSSE in a parcel of real estate, including residence, appurtenances, and improvements, located at 12177 Chaucer Lane, Woodbridge, Virginia.

4. Any and all interest of WILLIAM PAUL COVINGTON and LINDA DIANE KERSSE in $238,000 in United States currency.

5. Any and all interest of WILLIAM PAUL COVINGTON in $168,000 in United States currency.

6. Any and all interest of WILLIAM PAUL COVINGTON and LINDA DIANE KERSSE in $150,000 in United States currency.

7. Any and all interest of WILLIAM PAUL COVINGTON in a Browning model 81 BLR .308 caliber bolt action rifle, serial number 15490PW227.

8. Any and all interest of WILLIAM PAUL COVINGTON in a Browning BAR 30.06 caliber Belgium-made semi-automatic rifle, serial number 437RN50157.

9. Any and all interest of WILLIAM PAUL COVINGTON in a H&K model 91 .308 caliber semi-automatic assault rifle with collapsible stock, serial number A040356.

10. Any and all interest of WILLIAM PAUL COVINGTON in a SKS CAISI ALB V 7.62 caliber Chinese-made rifle with spiked bayonette, serial number 8900148.

11. Any and all interest of WILLIAM PAUL COVINGTON in a Taurus .357 Magnum nickle-plated revolver, serial number 120605.

12. Any and all interest of WILLIAM PAUL COVINGTON in a Grendol P-10 .380 caliber automatic handgun, serial number 17762.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON
a/k/a "Mr. Paul"
(Counts 1, 2, 3, 13-63), *et al.*

SUPERSEDING INDICTMENT

JANUARY 1992 Term—at Alexandria

* * * *

FORFEITURES WITH RESPECT TO COUNT 1

Pursuant to Title 21, United States Code, Section 853(a), the defendants shall forfeit to the United States of America any and all properties constituting, or derived from, proceeds the defendants obtained, directly or indirectly, as a result of a conspiracy and any properties used, or intended to be used by the defendants' in any manner or part, to commit, or to facilitate the commission of such violation. These assets include, but are not limited to, the following:

1. Any and all interest of WILLIAM PAUL COVINGTON in a parcel of real estate including residence, appurtenances, and improvements located at 7671 Fallswood Way, Lorton, Virginia.

2. Any and all interest of WILLIAM PAUL COVINGTON in Paul's Auto Service, Inc., including all accounts and assets.

3. Any and all interest of LINDA DIANE KERSSE in a parcel of real estate, including residence, appurtenances, and improvements, located at 12177 Chaucer Lane, Woodbridge, Virginia.

4. Any and all interest of WILLIAM PAUL COVINGTON and LINDA DIANE KERSSE in $238,000 in United States currency.

5. Any and all interest of WILLIAM PAUL COVINGTON in $168,000 in United States currency.

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11. Any and all interest of WILLIAM PAUL COVINGTON in a Taurus .357 Magnum nickel-plated revolver, serial number 120605.

12. Any and all interest of WILLIAM PAUL COVINGTON in a Grendol P-10 .380 caliber automatic handgun, serial number 17762.

* * * *

[Filed Jan. 2, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-00425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON

CONSOLIDATED RESPONSE OF THE UNITED STATES TO DEFENDANT'S PRETRIAL MOTIONS

COMES NOW the United States of America, by and through its attorneys, Richard Cullen, United States Attorney for the Eastern District of Virginia, and Jay Apperson, Assistant United States Attorney, and responds to defendant's motions as follows:

* * * *

The indictment as drawn is sufficiently specific and complete, and this Court in exercise of its broad discretion should deny the defendant's motions for a bill of particulars. *See United States v. Anderson*, *supra*, 481 F.2d at 690. *Accord*, *United States v. Chenaur*, 552 F.2d 294, 302 (9th Cir. 1977); *United States v. Brown*, 540 F.2d 364, 371 (8th Cir. 1976); *United States v. Pena*, 542 F.2d 292 (5th Cir. 1976).

* * * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal Action No. 91-425-A

UNITED STATES OF AMERICA

-vs-

WILLIAM PAUL COVINGTON,
Defendant.

Friday, March 13, 1992
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * * *

[43] MR. APPERSON: Your Honor, I suspect—let me give the background on this. We have been investigating this case for almost two years now. It is a continuing investigation. We have brought the Internal Revenue Service into the case because of the extensive money laundering activities, the extensive volume of United States currency that Mr. Covington was dealing in, amounts of currency and assets far beyond legitimate means.

The IRS has conducted and is continuing the process of continuing a complete financial analysis of Mr. Covington's financial situation. That requires them to identify every dollar that we can for it to be complete and ac-

curate, both legitimate sources of funds and illegitimate sources of funds.

THE COURT: Well, is the money that may have been paid by this defendant to Moffitt, the Moffitt firm, a subject of any count in the indictment of money laundering or other?

MR. APPERSON: No, Your Honor, there were no charges of money laundering. But it is certainly relevant, admissible, and specific evidence as required by the Nixon test of Mr. Covington. * * *

* * * *

[49] THE COURT: All right.

So, now let's address the subpoena.

MR. APPERSON: Thank you, Your Honor.

The subpoena, Your Honor, calls for, and it seems to me the letter was the thrust, if that takes that issue out. They have not really pursued today I think a request for that there is a privilege to be pursued. This subpoena is a narrowly-focused, a fee subpoena.

THE COURT: Your relevance assertion under the Nixon case is that it is evidence of unexplained wealth?

MR. APPERSON: Yes, Your Honor. It is also evidence by the nature of what we know circumstantially now, and I can't confirm that until of course we have the documents to show that. But my suspicion is, and [50] circumstantial evidence is that $13,000 of this $103,000 fee was in the form of raw street currency, Your Honor, under a hundred-dollar bills, as reflected on the 8300, and as confirmed by CTR filing at the bank.

THE COURT: But you are not seeking to forfeit.

MR. APPERSON: Your Honor, there has been no forfeiture proceeding instituted.

THE COURT: So it is really unexplained wealth of a particular kind, the dollar bills, or small currency?

MR. APPERSON: A portion of it—all of it is certainly unexplained wealth. It was currency. The Court, of course, heard the motion on the safe-deposit box. This

case, the $200,000—approximately. This case developed after about a year of seizures of virtually every asset of the bank accounts of this defendant, even and the end of that time he was able to command $30,000 in cash to the first law firm, and then $100,000 in cash to the next law firm. Even if the sources are legitimate income, Your Honor, the IRS needs to be able to identify that legitimate income, account for it, so we can check that off the ledger, and see what the balance is of illegitimate income. * * *

* * * *

Coulcyphon - Furniture Paint

Items not Served

Weekly expenses - $200/300 week painting - take people out Dinner + Dress

1987	48 weeks x $200	=	~~24,000~~ 9600	
1988	48 x	=	~~24,000~~ 9600	$ ~~24,000~~
1989	48 x	=	~~24,000~~ 9600	
1990 ½	24 x "	=	~~8,400~~ 4800	33,608

Ordinary clients - not Exc Assets - Per. Equipment

1988	FAmer	=	27,416
87	FAmer	=	8315
1990	FA+Am	=	6955
			42,686

Client Expenses Results from S.W.	~~6955~~ 7 from Last List 100	$ 18,138
	18,138	
Kyperopolus - Loan not Repaid		4,000
Terry Lumsden - Loan not Repaid		2,500
Anastasia - Loan not Repaid		4,000
Ellis - Loan not Repaid ≤ $5,000 Excel		8,000
		~~87,724~~ 99
SLB Total Page		112,924

BF 112,924

Alimony Payments - Ex to Ex W/F

5200 + 8400 + 5800 — 22,400

Toyota - 88 Tercel — 3,491
not sure - 1988 Z — 9500
- 1990 - ~~6863~~ 4030

Joint Bank Account
87 1558
88 B08
84 - 650 / 1500
90 - 300 / 3000

8108.00

Jewelry — 7988.00

→ 168,496.00

↗ ~~10000~~ 250,000 — 400,000

+ 10000 [illegible] 250,000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON, *et al.*

BILL OF PARTICULARS

The United States hereby gives notice that, in accordance with the forfeiture count in the indictment in this case, it seeks forfeiture of the following additional asset:

13. $103,800 in United States Currency, transferred by defendant WILLIAM PAUL COVINGTON to the law firm of Moffitt, Zwerling & Kemler, P.C., on or about August 23-August 26, 1991.

14. One 1975 Chevrolet Van, VIN: CGY155U190319, VA Tag UNOCME, registered to defendant Stephen Ward.

15. One 1978 Jeep, VIN: J8F83H068509, Va Tag HOTJEEP, registered to defendant Stephen Ward.

Respectfully submitted,

RICHARD CULLEN
United States Attorney

By: /s/ Gordon D. Kromberg
GORDON D. KROMBERG
Assistant United States Attorney
1101 King Street, Suite 502
Alexandria, Virginia 22314
(703) 706-3736

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

THE UNITED STATES OF AMERICA,
Plaintiff,
versus
WILLIAM PAUL COVINGTON,
Defendant.

Alexandria, Virginia
Friday, May 29, 1992

The above-entitled action came on to be heard before the Honorable T.S. Ellis, III, a Judge for the United States District Court for the Eastern District of Virginia, in Courtroom V, 200 South Washington Street, Alexandria, Virginia 22314, beginning at 2:05 o'clock p.m.

* * * *

[8] MR. KROMBERG: I would respectfully point the Court to the forfeiture count of the indictment, which is on page 37 of the superceding indictment, which states pursuant to Title 21 United States Code, Section 853(a):

> "The defendant shall forfeit to the United States of America any and all properties constituting or derived from proceeds the defendants obtained directly or indirectly as a result of the conspiracy and any properties used or attempted to be used by the defendants in any manner or part to commit or to facilitate the commission of such violation."

THE COURT: That's a general allegation and doesn't focus on any specific fund, and certainly not on legal fees. Why didn't you, in that case, focus on legal fees?

MR. KROMBERG: Because, Your Honor, the information that has been developed in this investigation didn't exist at a sufficient level for us to obtain the Department of Justice authorization.

The Court should be aware that there are two different standards that must be met before we or any U.S. Attorney's office can go forward with an attorney fee forfeiture case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON, *et al.*

GOVERNMENT'S REPLY TO LAW FIRM'S RESPONSE TO MOTION FOR RESTRAINING ORDER

* * * *

According to the law firm, the United States constitutionally cannot seek forfeiture of attorney fees unless the forfeiture was initiated at the "outset" of the case. LFB at 19. Whenever the "outset" may be, the law firm's rule would preclude the United States from seeking forfeiture of attorney fees unless it possessed evidence of the payment of the fees *before* the "outset" of the case. As ridiculous as that rule might be in theory, it would be utterly absurd in a case like Covington's. The "outset" of the investigation took place long before Covington even retained the law firm. By the law firm's theory, under such circumstances, the $103,800 could not be forfeited at all.

The law firm suggests that the indictment should constitute the "outset" of the case. LFB at 19. Of course, in this case, by the time of the initial indictment, the United States was yet unaware of the $103,800 paid to the law firm and, accordingly, could never have sought

forfeiture under the law firm's theory. If, alternatively, the United States could seek forfeiture of the fees by issuing a superseding indictment, and, thereby, shift forward the "outset" of the case, then, in this case, the United States could again supersede the indictment and specify the $103,800 in the forfeiture count.[10]

As can be seen, application of the law firm's suggested rule, that the United States could only seek forfeiture of attorney fees if it initiated such action at the "outset" of the case, would lead either to results contrary to the purpose of the forfeiture statute or to absurdities. Moreover, the law firm's suggested rule ignores well-settled law regarding the prosecutor's discretion to add to an existing indictment. *United States v. Goodwin*, 457 U.S. 368, 381-82 (1982) (because a prosecutor must have the flexibility to add to his indictment, not only on the basis of newly discovered information, but also upon his recognition of the meaning of the evidence he already possesses, an initial charging decision should not freeze future conduct).[11]

* * * *

[10] Of course, if the United States could shift the "onset" of the investigation (and trigger forfeiture of the $103,800 without running afoul of the law firm's suggested rule) by superseding its indictment, and such action would have the same effect as merely issuing a bill of particulars supplementing the existing forfeiture count, then there is no reason to require the superseding indictment in the first place.

[11] In addition, acceptance of the law firm's argument would require the additional, and untenable, conclusion that the United States must also forego the possibility of seeking recovery of forfeitable funds through subsequent civil action.

[Filed Sept. 25, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON,
Defendant.

PLEA AGREEMENT

Richard Cullen, United States Attorney for the Eastern District of Virginia, and Gordon D. Kromberg, Assistant United States Attorney, and the defendant, WILLIAM PAUL COVINGTON, and the defendant's counsel, pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, have entered into an agreement, the terms and conditions of which are as follows:

* * * *

10. This plea agreement is being entered into by the United States on the basis of the defendant's express representation that the defendant will make a full and complete disclosure of all assets over which the defendant exercises control, directly or indirectly, or in which the defendant has any financial interest. The defendant agrees to forfeit, and hereby forfeits, whatever interest the defendant has in any asset related to drug trafficking and/or money laundering that the defendant owns or over which the defendant exercises control, directly or indirectly, or which the defendant has transferred to third parties, including but not limited to cash, bank accounts,

financial instruments, real or personal property, both foreign and domestic.

This property includes, but is not limited to the following specific property, each of which constitutes, or derives from, proceeds obtained, directly or indirectly, as the result of the unlawful conspiracy to which he is pleading guilty, or was used or intended to be used, in any manner or part, to commit or to facilitate the commission of such unlawful conspiracy, or was involved in the money laundering:

a. Real estate including residence, appurtenances, and improvements located at 7671 Fallswood Way, Lorton, Virginia.

b. $233,320 in United States currency stored in safe deposit box #55, Prosperity Bank & Trust Company.

c. Paul's Auto Service, including any and all accounts, automotive equipment, and other assets, excluding only hand tools.

d. One Browning model 81 BLR .308 caliber bolt action rifle, serial number 15490PW227.

e. One Browning BAR 30.06 caliber Belgium-made semi-automatic rifle, serial number 437RN50157.

f. One H&K model 91 .308 caliber semi-automatic assault rifle with collapsible stock, serial number A040356.

g. One SKS CAISI.ALB V 7.62 caliber Chinese-made rifle with spiked bayonet, serial number 8900148.

h. One Taurus .357 Magnum nickel-plated revolver, serial number 120605.

i. One Grendol P-10 .380 caliber automatic handgun, serial number 17762.

j. One Taurus PT 22 AF 9mm semi-automatic pistol, serial number T1A62551.

k. $103,800 in United States Currency, transferred by defendant WILLIAM PAUL COVINGTON to the

law firm of Moffitt, Zwerling & Kemler, P.C., on or about August 23-August 26, 1991.

l. $27,800 in United States Currency, transferred by defendant WILLIAM PAUL COVINGTON to the law firm of Phillips, Beckwith & Hall, on or about June 6, 1990, June 22, 1990, and July 6, 1990.

m. To the extent that defendant WILLIAM PAUL COVINGTON has any interest in the real property and premises known as 12177 Chaucer Lane, Woodbridge, Virginia purchased by Linda D. Kerrse with the proceeds of his drug trafficking, he agrees to forfeit such real property.

Defendant agrees to waive any interest in any listed asset in any administrative or judicial forfeiture proceeding, whether criminal or civil. With regard to the equipment of Paul's Auto Service, only, the United States will remit to defendant 50 percent of the proceeds of the sale of such equipment after the expenses of seizure, storage, and forfeiture are deducted.

11. The defendant agrees to cooperate fully in helping the United States identify any assets derived from or used to facilitate drug trafficking or involved with money laundering, including undergoing a complete and thorough debriefing on all the defendant's assets. This includes any asset owned or under the control, directly or indirectly, of the defendant within the past eighteen (18) months, that may have been transferred to another. The defendant agrees to undergo any polygraph examination the United States may choose to administer concerning such assets and to provide and/or consent to the release of the defendant's tax returns for the previous five (5) years. Defendant agrees ot forfeit to the United States all of the defendant's interests in any asset of a value of more than $1,000 that, within the last eighteen (18) months, the defendant has owned, or in which the defendant has maintained an interest, the ownership of which the defendant

fails to disclose to the United States in accordance with this agreement.

12. The defendant consents to entry of the attached orders of forfeiture and further agrees to take whatever steps are necessary to pass clear title to forfeitable assets to the United States, including, but not limited to, waiving any privilege with respect to information regarding any such assets, surrendering title, signing additional forfeiture orders, signing a consent decree, stipulating facts regarding the transfer and basis for the forfeitures and signing any other documents necessary to effectuate such transfers. The defendant also agrees to direct any banks or other third parties which have or have had custody of assets of the defendant to turn over all funds and records of such assets to the United States and to testify truthfully in any judicial proceeding as requested by the United States. Defendant further agrees to identify the amount of monies derived from drug trafficking or involved with money laundering, if any, that he transferred or caused to be transferred upon his behalf to third parties, including the law firms of Phillips Beckwith & Hall and/or Moffitt, Zwerling & Kemler, and to forfeit and to consent to the entry of forfeiture orders for the forfeiture of all such monies.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 91-425-A

UNITED STATES OF AMERICA

-vs-

WILLIAM PAUL COVINGTON,
Defendant.

GUILTY PLEA

September 25, 1992

Before: CLAUDE M. HILTON, Judge

* * * *

[7] THE COURT: All right. Now, along with this plea agreement there was a statement of facts handed to me. Have you reviewed that statement of facts?

THE DEFENDANT: Yes, I have.

THE COURT: Have you reviewed it with your attorney?

THE DEFENDANT: I have.

THE COURT: Do you disagree in any particular with this statement of facts?

THE DEFENDANT: No, I don't.

THE COURT: Is what this statement of fact says happened in fact what did happen?

THE DEFENDANT: Yes.

* * * *

[9] THE COURT: All right, that motion is granted. And I will enter the order now dismissing the remaining counts. And there is a consent of forfeiture that has been handed to me.

MR. KROMBERG: Your Honor, there is nothing controversial in any way about that order of forfeiture. If there is anything else controversial in this case, that will come in a subsequent order of forfeiture.

THE COURT: All right. I have entered the order of forfeiture. Is January 8 an agreeable day for sentencing?

MR. BEHR: That's fine, Your Honor.

* * * *

RELEVANT EXCERPT FROM INDICTMENT IN CAPLIN & DRYSDALE

* * * *

B. Forfeiture

From their engagement in the aforesaid continuing criminal enterprise, the defendants CHRIS RECKMEYER, ROBERT RECKMEYER, and BRUCE THOMASON shall forfeit to the United States any profits they obtained arising from their participation in the said enterprise and any of their interests in, claims against, and property and contractual rights of any kind which afforded a source of influence over said enterprise, including but not limited to the following:

1. Condominium Unit Number M-48 in Estate Questa Verde, lying and being in Estate Hermon Hill, Company Quarter, Christianstead, St. Croix, U.S. Virgin Islands, together with 1.22366 percent individual interest in the common areas and facilities so declared in the Declaration of Condominium to be appurtenant to the above-described condominium unit; and all rental and lease income from condominium Unit Number M-48.

2. A parcel of land containing 675.49 acres, more or less, with all improvements, structures, livestock, machinery and appurtenances thereto, known as the "Shelburne Glebe" located on the southeast side of Road No. 729 approximately 4.5 miles southwest of Leesburg, in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 769 beginning at page 03 in the land records of Loudoun County, Virginia.

* * * *

12. A January 6, 1984 promissory note payable to CHRIS RECKMEYER and Nancy Reckmeyer by William J. Reckmeyer, Sr. in the amount of $112,500 plus accrued interest.

13. All accounts receivable of CHRIS RECKMEYER payable by Michael J. Kapper.

14. Eight oriental carpets totalling 162 square feet belonging to CHRIS RECKBEYER and held on consignment by Brett C. Leavenworth in Tucson, Arizona.

15. Any and all stock, assets and inventory of Unlimited Investments, Inc., a corporation in the State of Virginia, including but not limited to, all accounts at any financial institutions, typewriters, scales, file cabinets, safes and oval carpet.

16. Any and all of the shareholder and ownership interest of CHRIS RECKMEYER and Nancy L. Reckmeyer in B.C.P., Inc., a corporation in the State of California.

17. Any and all stock, financial, or other ownership interest of Chris Reckmeyer in American Deli, Inc., a corporation in the State of Florida.

18. A November 1983 promissory note in the amount of $5,000 plus accrued interest payable to CHRIS RECKMEYER by Mark B. Newman, President of the American Deli, Inc.

19. Any and all stock, assets and inventory of Crancy's Inc., a corporation in the State of Virginia.

20. Any and all stock, assets and inventory of Organic Foods, Inc., a corporation in the State of Virginia.

21. Any and all stock, assets and inventory of Manpower Management, Inc., a corporation in the State of Virginia.

22. Any and all stock, assets and inventory of United Trade, Inc., a corporation in the State of Maryland, also doing business as "East West Design" in the State of Virginia.

23. Any and all stock, assets and inventory of Robert Bruce Products.

24. Any and all stock, assets and inventory of Atlantis Stone Corporation, a corporation in the State of Delaware.

25. Any and all stock assets and inventory of Mainland Carpets, Inc., a corporation in the State of Virginia.

26. Any and all possessions of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON with a retail value of $1,000 or more, including but not limited to, furniture, musical instruments, appliances, carpets, electronic devices, art objects, and antiques; including but not limited to such possessions located at the "Shelburne Glebe" in Loudoun County, Virginia and at 12900 Westbrook Drive, Centreville, Virginia.

27. A 1973 Mercedes-Benz four door sedan, vehicle identification number 11406012004068.

28. A 1974 Chevrolet two door coupe, vehicle identification number 1L57H4Y126501.

29. A 1976 Chrysler four door sedan, vehicle identification number CM41N60164365.

30. A 1979 Ford Pickup Truck, vehicle identification number F26HEEJ3709.

31. A 1978 Chevrolet four door station wagon, vehicle identification number CCL168F203822.

32. A 1974 Cadillac four door sedan, vehicle identification number 6B69R4Q172668.

33. A 1979 Chevrolet station wagon, vehicle identification number CCS269F109212.

34. A 1984 Chevrolet station wagon, vehicle identification number 1G8GC26M5EF107085.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

UNITED STATES OF AMERICA

v.

WILLIAM PAUL COVINGTON

GOVERNMENT'S SUPPLEMENTAL OPPOSITION TO LAW FIRM'S MOTION TO VACATE ORDER OF FORFEITURE

---

* * * *

On November 13, 1991, Covington's girlfriend, Joy Ashton, was intercepted discussing Covington having paid Moffitt $100,000 and Phillips $50,000. Significantly, there was no reference to the form of payments.

On November 14, 1991, a check of an IRS computer data base failed to reveal the entry of any cash payments from Covington having been received by the Moffitt, Zwerling law firm. It similarly failed to identify the entry of any cash payments from Covington having been received by the Phillips, Beckwith law firm. While IRS records did reflect large amounts of currency transactions during August/September 1991, by the Moffitt, Zwerling law firm, the records did not show when the cash had been received.

On November 19, 1991, Ronald Earl Schee pled guilty and was later debriefed. He provided information which included, among other things, that "Spencer" was Covington's principal cocaine supplier.

On November 20, 1991, law enforcement agents obtained the cooperation of William "Junior" Attkisson, a major customer of defendant Covington. Attkisson provided evidence that suggested that Covington had transferred a large sum of cash to the law firm. According to Attkisson, Covington had telephoned him and asked him to pay a significant drug debt. Attkisson told investigators that he brought tens of thousands of dollars in cash to Covington and then helped Covington count the money, which Covington told Attkisson was needed to pay his $100,000 fee to the law firm.

* * * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal Action No. 91-425-A

UNITED STATES OF AMERICA

-vs-

WILLIAM PAUL COVINGTON,
Defendant.

Friday, March 13, 1992

Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * * *

THE COURT: It seems to me that, if, as you seem to suggest, you might be criticized for not bringing it to their attention, your perfect answer would be that here we were involved in a case, I didn't want to mess up my case with that sort of thing, which frankly has now perhaps occurred.

MR. APPERSON: Well, Your Honor, I make mistakes all the time. I do things that I might do differently later. This may be one of those times. But I want to assure the Court that it was not my intention or anyone in our office, or anyone in the Department of Justice, to threaten prosecution. In fact, it is a phenomenal letter.

No other citizen in this country who violates the law, or who potentially violates the law, is sent a letter and saying, please fill out a new form and that will take care of the matter.

That was the intention. If the effect was something other than that, I can only apologize as a personal matter.

THE COURT: Perhaps it would have been better if you had treated it like any other citizen was treated.

It concerns me. And the perception, regardless of actual motives, the perception that arises from the timing of it is damning, it seems to me, to the United States Attorney's Office. The idea that you threaten a lawyer with prosecution a few weeks before trial in which he is involved, it looks like, whatever you meant, that you are trying to drive that lawyer out of the case.

If it was with another client—I mean, if it was with Joe Blow that the firm had represented 6 months ago—but here is the very client that is set to be tried in a few weeks; and you send a letter with the subpoena that, whatever you call it, it notifies the defendants, the lawyer, of a possible criminal violation if he doesn't fill out the name of his client on this form, the very client that has been indicted, that he is now representing, and it is set to go to trial in a few weeks.

I am at a loss for an explanation. I really haven't received a good one yet, Mr. Apperson.

MR. APPERSON: Your Honor, I note the Court's perception in that regard. If this were to come up again, based on the Court's perception which I hear, I would not do it. And if I had it to do over, based—

THE COURT: (Interposing) I would suggest that the Government voluntarily withdraw that letter.

MR. APPERSON: I don't know how the Government can withdraw the letter, Your Honor. The letter was sent. If Mr. Moffitt wants me to, and the law firm wants me to take the letter back today and just pretend we didn't see it, I will do that. But how does one withdraw a letter? I don't know.

* * * *

United States Attorney
Eastern District of Virginia

Forfeiture of Attorney Fees — March 16, 1992
United States v. William Paul Covington
Criminal No. 91-00425-A

Asset Forfeiture Office
Criminal Division
Department of Justice

Richard Cullen
United States Attorney

The United States Attorney for the Eastern District of Virginia seeks Department approval for the forfeiture of fees paid to attorneys who (1) represented defendant William Paul Covington, and (2) fees paid to attorneys who are currently representing defendant William Paul Covington.

As set forth below, there are reasonable grounds to believe that the attorneys had actual knowledge that the fees paid to them were derived from and represented the proceeds of defendant's unlawful narcotics trafficking as set forth in the superseding indictment (Criminal No. 91-425-A).

TIME FRAME

Upon approval, the United States will file a Bill of Particulars to specifically identify the fees which shall be forfeited to the United States and submitted to the jury as forfeiture with respect to Count 1 of the superseding indictment. Trial is set for March 30, 1992. The Bill of Particulars will need to be filed in the case on Wednesday, March 18, 1992.

Forfeiture is sought following the United States' previous subpoena of attorney records previously approved by the Department. The District Court granted attorneys' motion to quash subpoenas thus denying the government the needed evidence.

In the context of the proceedings to quash, movants noted the inconsistency in the United States' position of seeking fee records from attorneys alleging that the fees were drug monies, while not seeking forfeiture of the fees themselves. The District Court also questioned the United States as to whether we were seeking to forfeit the fees. In response, we told the Court that we had not moved to forfeit the fees. It is likely that the District court would have ruled differently had we sought forfeiture of the fees themselves.

The United States will seek reconsideration of the court's ruling in light of the forfeiture of the fees themselves as reflected in the Bill of Particulars. Alternatively the United States will seek an interlocutory appeal to the Fourth Circuit Court of Appeals of the court's granting the motion to quash. In that context the decision to forfeit the fees will similarly provide a consistent position for the United States.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 91-425-A

THE UNITED STATES OF AMERICA,
Plaintiff,

versus

WILLIAM PAUL COVINGTON,
Defendant.

Alexandria, Virginia

Friday, July 10, 1992

The above-entitled action came on to be heard before the Honorable T.S. Ellis, III, a Judge for the United States District Court for the Eastern District of Virginia.

* * * *

MR. SCHOTT: May it please the Court, let me just start by saying that there's no intention on the part of the government to drive the law firm out of this case. To the contrary—

THE COURT: Reasonable people could view it otherwise.

MR. SCHOTT: Absolutely. I understand that. That's why I wanted to address this up front, although that's not really the issue—

THE COURT: I take it what you're saying is that your conduct in this case will be different.

MR. SCHOTT: Well, what I'm saying is—

THE COURT: That is that you will avoid—assiduously avoid any effort or anything that might be mistaken as that.

* * * *

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-356

In the Supreme Court of the United States

OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
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23 pp

QUESTIONS PRESENTED

1. Whether the government's specifying assets subject to forfeiture in a bill of particulars is "inherently unconstitutional."

2. Whether the Comprehensive Forfeiture Act of 1984 preempted the use of state law remedies in support of the government's narcotics interdiction efforts.

3. Whether the government stated a claim for conversion under Virginia law.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-356

MOFFITT, ZWERLING & KEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 83 F.3d 660. The opinions of the district court (Pet. App. 22a-52a, 53a-88a, 124a-152a) are reported at 875 F. Supp. 1190, 875 F. Supp. 1152, and 846 F. Supp. 463, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1996. A petition for rehearing was denied on June 4, 1996 (Pet. App. 169a). The petition for a writ of certiorari was filed on September 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a criminal prosecution brought in the United States District Court for the Eastern District of Virginia, the United States obtained a determination that $103,800 paid by a criminal defendant to petitioner represented the proceeds of that defendant's narcotics trafficking, and was therefore forfeitable under 21 U.S.C. 853. The district court rejected petitioner's claim that it was an "innocent owner" under 21 U.S.C. 853(n), but accepted petitioner's claim that the government could not rely on Virginia law to recover the bulk of the money, which petitioner had dissipated. The court of appeals affirmed the district court's finding that petitioner was not an "innocent owner" entitled to relief from forfeiture under Section 853(n), but it reversed the district court's ruling that the government was barred by Section 853 from pursuing state-law causes of action. Pet. App. 1a-21a.

1. Between 1990 and 1991 William Paul Covington was the subject of a grand jury investigation into narcotics trafficking. As a result of that investigation, Covington's assets worth hundreds of thousands of dollars were seized, because they were derived from his narcotics activities. Covington responded to the investigation and seizures by retaining the law firm of Phillips, Beckwith and Hall, but he ultimately elected not to contest the seizures, and most of the property was forfeited administratively. Pet. App. 125a.

In August 1991, after the uncontested seizures of the great bulk of his property, Covington retained petitioner Moffitt, Zwerling & Kemler to take over his defense from the Phillips, Beckwith law firm. Covington paid petitioner's retainer fee of $103,800 in

cash, in two installments. The first installment of $17,000 was paid on August 23, 1991, with a "wad of bills" that Covington "fished from his pocket." Pet. App. 3a; *id.* at 135a. The second installment of $86,800 was delivered on the next day in bundles of cash "stuffed into a shoe box or Ritz cracker box." *Id.* at 21a. Petitioner did not inquire as to the source of Covington's funds, but instead, as the court of appeals put it, "engag[ed] in * * * a wink and nod ritual whereby [it] agreed not to ask * * * too much." *Id.* at 9a. After receiving each bundle of cash, petitioner complied with Covington's request that a receipt not be issued to him—a request based on Covington's expressed fear that any such receipt might fall into the hands of the FBI. *Id.* at 135a-136a; *id.* at 8a-9a. Petitioner also failed to report Covington's identity on Internal Revenue Service Form 8300, as required by law. *Id.* at 3a, 127a & n.7.

In October 1991, Covington was indicted. Pet. App. 4a. That indictment, and a superseding indictment returned in January 1992, both provided for the forfeiture of "any and all" property constituting proceeds of Covington's drug dealing activities or used to facilitate those activities, pursuant to 21 U.S.C. 853(a). Pet. App. 4a, 180a-183a. The indictments further provided that such property "includ[ed], but [was] not limited to," 12 listed assets, one of which was identified as "$168,000 in United States currency." *Id.* at 126a-127a, 181a, 183a. In May 1992, the United States filed a bill of particulars stating that the $103,800 fee paid to petitioner was subject to forfeiture. *Id.* at 4a, 191a. The government obtained a restraining order to prevent dissipation of the fee. *Id.* at 4a.

Covington decided to plead guilty, but petitioner discouraged him from doing so on the ground that such a plea would place petitioner's acceptance of the fee in an unfavorable light. Pet. App. 4a, 129a. After petitioner's stance came to light, the district court determined that petitioner had placed itself in a conflict of interest and disqualified petitioner from further representing Covington. *Ibid.* The court appointed new counsel for Covington. On the advice of that new counsel, Covington entered a plea of guilty to three counts of the indictment. In accordance with that guilty plea, the court ordered, subject to the rights of innocent third parties under 21 U.S.C. 853(n), the forfeiture of virtually all of Covington's assets, including the legal fee paid to petitioner. Pet. App. 4a, 129a-130a.

2. Petitioner filed a motion to vacate the order forfeiting its $103,800 fee under 21 U.S.C. 853(n)(6)(B). Petitioner claimed that it was "reasonably without cause to believe" that the fee was subject to forfeiture. Pet. App. 4a-5a. The district court denied the motion. *Id.* at 5a. After a two-day evidentiary hearing, the district court determined that the "record compels the conclusion that the $103,800 in cash" paid to petitioner "constituted the proceeds from Covington's drug trafficking activities," adding that "[t]here was simply no credible or persuasive evidence to the contrary." *Id.* at 130a-131a. Relying on *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617 (1989), the district court rejected (Pet. App. 137a) petitioner's claim that law firm fees are not subject to forfeiture under 21 U.S.C. 853, and added that *Caplin & Drysdale* did not stand for the proposition that attorneys' fees "may be subject to forfeiture only through notice in an indictment"; rather, "fees

received prior to indictment are subject to forfeiture where the other requirements of § 853 are met." Pet. App. 138a-139a. Finally, the court explained that petitioner could not reasonably have believed that the $103,800 in cash was derived from legitimate sources, because, in light of the suspicious circumstances under which petitioner accepted the fee, any such belief "was at best a hope, and a forlorn one at that." *Id.* at 140a; see also *id.* at 150a (noting that petitioner failed to establish "innocent owner" defense).

The government then sought to obtain a final decree of forfeiture of petitioner's $103,800 fee. Pet. App. 5a. The district court ruled, however, that 21 U.S.C. 853 entitled the government to recover only $3,695, which was the amount that petitioner claimed it had not spent from the original fee of $103,800, plus any specific property acquired by petitioner with Covington's drug proceeds. Pet. App. 120a. The court took "no position" on whether the government might sue petitioner to recover the dissipated assets under state law. *Id.* at 123a n.49.

3. While relying on Section 853 to recover property traceable to the $103,800 paid to petitioner for legal fees, the government also pursued state-law remedies against petitioner. Pet. App. 5a. On October 21, 1994, the government filed a civil action seeking to recover the $103,800 on the basis of two theories: conversion and detinue (*i.e.*, replevin) under Virginia law. *Id.* at 26a. Petitioner countered that the government had failed to establish the elements of those state-law claims. *Id.* at 30a. The district court agreed as to detinue, because it interpreted Virginia law to require "that the defendant must have

possession of the disputed property at the time the action commences." *Id.* at 32a.[1]

As to conversion, the district court concluded that the government had stated a claim under Virginia law, but it held that a conversion action was preempted by federal law in these circumstances. Pet. App. 34a-42a. The court first explained that under the plain language of the "relation back" provision (see 21 U.S.C. 853(c)), the government had a right to immediate possession of the $103,800 in August 1991, when petitioner converted the money to its own use.[2] Thus, the government met the state-law requirement that a plaintiff show a right to "immediate possession" of the property at the time the conversion occurred. Pet. App. 34a-39a. The court nonetheless concluded that the government's conversion claim was preempted by the "comprehensive criminal forfeiture scheme" in 21 U.S.C. 853, relying particularly on the fact that Section 853 expressly authorizes the recovery of "substitute assets" from criminal defendants but contains no parallel authorization with respect to third parties. Pet. App. 43a-51a. The court accordingly dismissed the government's conversion action as "preempted by federal law." *Id.* at 52a.

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[1] The district court acknowledged that Virginia cases render a defendant liable in detinue even when he has transferred the property, unless the transfer occurred by operation of law. But the court concluded that the Virginia cases are not "recent ones," and that those cases would not be followed today by the Virginia courts. See Pet. App. 33a n.16.

[2] Alternatively, the court determined that under 21 U.S.C. 881(b)(4), the government had authority to seize the $103,800 in August 1991, because the government had probable cause at that time to seize all of Covington's cash under the civil forfeiture statute. Pet. App. 40a-42a.

4. Petitioner and the United States both appealed. The court of appeals affirmed the district court's denial of petitioner's motion to vacate the order forfeiting the cash Covington paid to petitioner, but it reversed the preemption ruling and reinstated the government's state-law action for conversion. Pet. App. 1a-21a.[3]

a. The court rejected as "meritless" (Pet. App. 6a) petitioner's claim that the district court lacked jurisdiction to enter the forfeiture order because the $103,800 in cash transferred to petitioner was not specified in the superseding indictment of Covington. The court noted that the indictment did list (*id.* at 182a-183a), among the assets to be forfeited, "any and all properties constituting, or derived from" proceeds obtained as a result of Covington's criminal activity, including $168,000 in United States currency that had not yet been accounted for. *Id.* at 6a. The court also explained that no further detail was required, because, under *Libretti* v. *United States*, 116 S. Ct. 356 (1995), forfeiture is part of a criminal sentence, not an element of any substantive criminal offense; thus, "[a] bill of particulars is an appropriate way to pinpoint certain assets, noted in the indictment, as subject to forfeiture." Pet. App. 6a-7a. Petitioner's argument to the contrary, the court added, was "little more than an attempted end-run around" this Court's decision in *Caplin & Drysdale*, "which squarely rejected constitutional claims lodged against attorney fee for-

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[3] In light of its conclusion that the conversion action should be reinstated, the court of appeals found it unnecessary to reach the government's argument that the district court had also erred in dismissing the government's detinue claim. Pet. App. 18a n.3.

feiture." *Id.* at 7a. In any event, the court noted, petitioner could not show any prejudice from the grand jury's failure to name the $103,800 paid to petitioner, in haec verba, as one of the assets encompassed within the forfeiture allegation, because the district court found that that cash was indeed forfeitable "proceeds of criminal activity" and petitioner did "not even contest" that finding in the court of appeals. *Ibid.*

The court of appeals next rejected petitioner's claim that it was an innocent transferee of the forfeited property under 21 U.S.C. 853(n)(6). Pet. App. 8a-9a. The court of appeals could "find no fault" in the district court's factual findings in this regard, *id.* at 8a, agreeing that the circumstances surrounding Covington's large cash payment "were, to put it mildly, highly suspicious." *Id.* at 9a. The court also noted that petitioner's attorneys "tiptoed around the most pertinent questions" concerning the source of Covington's funds, and it concluded that the record as a whole disclosed "nothing less than a mass of evidence available to [petitioner] in August 1991 that pointed convincingly to the conclusion that the cash fee constituted, or was derived from, drug trafficking proceeds." *Ibid.* (internal quotation marks omitted). In those circumstances, the court concluded, petitioner "reasonably had cause to know that the $103,800 was subject to forfeiture, and thus its § 853(n)(6) petition was properly rejected." *Ibid.*

b. Turning to the government's appeal, the court of appeals agreed with the district court's conclusion that "the government * * * stated the elements of a conversion action" under Virginia law. Pet. App. 18a. The court of appeals rejected, however, the district court's view that a conversion action is preempted by the federal forfeiture statutes. Relying on *United*

States v. *Texas*, 507 U.S. 529 (1993), the court of appeals explained that, in general, "common law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights." Pet. App. 12a. The court further explained that the government's reliance on the "relation back" provision in 21 U.S.C. 853(c) to establish one element of the government's common law cause of action "does not remove this case from the reach of *Texas*." Pet. App. 13a. Rather, the court noted, "[j]ust as any party might rely on legal or contractual authority to establish a right to possess a piece of property, the government has the perfect right to point to other provisions of law that confer a right to possession of the fee." *Ibid.*

The court of appeals rejected the notion that the "substitute assets" provision of 21 U.S.C. 853(p), which allows the government to recover substitute assets from a criminal defendant, forbids "by negative implication" (Pet. App. 14a) any recovery from third-party transferees who no longer possess forfeited property. *Ibid.* The court noted that "[f]ar from creating a positive conflict" or "impeding the purposes of" the federal forfeiture statute (*id.* at 15a), the "state actions pursued by the government *promote* the aims of the statute." *Ibid.* And while the court of appeals accepted petitioner's contentions that the forfeiture statute "recognizes and protects the interests of third-party transferees," the court concluded that "[t]he extent of that protection * * * is spelled out in § 853(n), which prevents the forfeiture of assets held by innocent third parties." *Id.* at 16a. Petitioner, the court observed, "was given the full benefit

of this provision, but it failed utterly to demonstrate that it was an innocent transferee." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 13-20) that the government's use of a bill of particulars to specify that petitioner's $103,800 fee was subject to forfeiture was "inherently unconstitutional." In support of that contention, petitioner characterizes the decision below (Pet. 16-17) as permitting the government to circumvent the Fifth and Sixth Amendment rights of criminal defendants and the Fifth Amendment rights of "innocent" defense counsel who have given value for the fee. Petitioner also suggests that it is "undisputed" (Pet. 15-16) that the government used forfeiture as a tactical weapon to disqualify petitioner from Covington's representation. Those allegations not only reprise petitioner's tactic of attacking the government in order to divert attention from its own misconduct (see Pet. App. 20a-21a), but also unfairly characterize or treat as "undisputed" matters that *were* disputed by the government *and* were found adversely to petitioner in the courts below. To put it briefly, both courts below concluded that petitioner is *not* entitled to the protections that the forfeiture statute affords to "innocent" parties; moreover, as the court of appeals noted, the district court disqualified petitioner from Covington's representation because of "disturbing" evidence (*id.* at 21a) that petitioner subordinated Covington's interests to its desire to retain a fee that was clearly forfeitable under Section 853 and this Court's decision in *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617 (1989). See also Pet. App. 7a (noting that "the district court, after extensive review of the record, conclud[ed] that there

is no factual predicate for asserting a claim of prosecutorial abuse") (internal quotation marks omitted).[4]

Indeed, contrary to petitioner's assertion, this case does not properly present any issue concerning the constitutional rights of criminal defendants. While this Court held in *Caplin & Drysdale* that criminal defense counsel, in challenging the forfeiture of funds paid as attorneys' fees, could rely on *jus tertii* to assert their client's Sixth Amendment right to the assistance of counsel, see 491 U.S. at 623 n.3, it does not necessarily follow that defense counsel may rely on *jus tertii* to assert the defendant's rights under the Grand Jury Clause of the Fifth Amendment, which does not address the relationship between the accused and counsel. Moreover, *Caplin & Drysdale* did not involve a law firm which, like petitioner, was disqualified from the representation because the firm's "desire to protect its fee was overriding its obligation to represent its client," Pet. App. 7a, and thus had placed itself in a position of square antagonism to the client's interests. In these circumstances, petitioner's claim that Covington was deprived of a

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[4] In a similar vein, petitioner contends that "there is no dispute that the $168,000 in cash [listed in Covington's indictment] refers to specific cash other than that paid to" petitioner. Pet. 19 n.9. In the court of appeals, however, the government affirmatively disputed, and rebutted, petitioner's assertion by referring the court of appeals to specific testimony heard by the grand jury that indicted Covington. See Gov't C.A. Answering and Reply Br. 18-19 & n.16. While it is evident that petitioner continues to disagree with the merits of our argument, it is difficult to see how that disagreement entitles petitioner to represent to this Court that "there is no dispute" on the question.

meaningful grand jury indictment may be rejected on the basis of the usual rule that, by pleading guilty, Covington himself elected to waive any such defect. See, *e.g.*, *United States* v. *Broce*, 488 U.S. 563, 569 (1989); *Mack* v. *United States*, 853 F.2d 585, 586 (8th Cir. 1988) (guilty plea "waives all challenges to the prosecution * * * except challenges to the court's jurisdiction"); *United States* v. *Mathews*, 833 F.2d 161, 163-164 (9th Cir. 1987) (same); *Hayle* v. *United States*, 815 F.2d 879, 881 (2d Cir. 1987) (same); see also *Valencia* v. *United States*, 923 F.2d 917, 920 (1st Cir. 1991) (reaffirming waiver rule and noting that a defendant who has pleaded guilty accordingly "may not later contest the factual and theoretical foundations of the indictment to which he has pled").

In any event, there is no sound basis for petitioner's claim (Pet. 18) that *Caplin & Drysdale*, 491 U.S. at 632 n.10, must be taken to establish the proposition that "any assets which the Government wishes to have forfeited must be specified in the indictment." Recently, this Court placed in context the similar statement in *Caplin & Drysdale* that "forfeiture is a substantive change in the indictment" (see *id.* at 628 n.5), explaining that the Court "intended only to suggest that a defendant cannot escape an otherwise appropriate forfeiture sanction by pointing to his need for counsel to represent him on the underlying charges." *Libretti* v. *United States*, 116 S. Ct. 356, 363 (1995). In fact, the Court's decision in *Caplin & Drysdale* did not purport to restrict the government's use of a bill of particulars to pinpoint assets listed more generally in an indictment as being subject to forfeiture. As the court of appeals explained, the filing of a bill of particulars is an established method of specifying assets subject to forfeiture. Pet. App.

7a. See, *e.g.*, *United States* v. *Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (Fed. R. Crim. P. 7(c)(2) "does not * * * require that the indictment describe each item subject to forfeiture. This can be done in a bill of particulars."), cert. denied, 469 U.S. 837 (1984); *United States* v. *Grammatikos*, 633 F.2d 1013, 1024-1025 (2d Cir. 1980). Indeed, in *Libretti*, the government identified additional property subject to forfeiture in a bill of particulars, 116 S. Ct. at 366, and the Court upheld the subsequent forfeiture order. *Id.* at 367.

Finally, apart from the legal shortcomings of petitioner's theory, there is no support in the record for petitioner's basic claim that the forfeiture in this case occurred without any "neutral check" such as would have been provided by "the grand jury's probable cause scrutiny." Pet. 18. Even assuming, contrary to the conclusions of both courts below, that the cash transferred to petitioner was not encompassed within the forfeiture allegations of the indictment, petitioner had the benefit of an adversary hearing on the question of forfeitability in the district court, which gave petitioner far more than it could have expected from the ex parte judgment of the grand jury. Compare *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986). After that hearing, the district court concluded that "[t]here was simply no credible or persuasive evidence" that the fee was anything other than "proceeds from Covington's drug trafficking activities." Pet. App. 131a. Because petitioner chose not to challenge that finding on appeal, the court of appeals correctly concluded that "[i]t is

* * * difficult to identify any prejudice to [petitioner] from the procedure followed here." *Id.* at 7a.[5]

2. Petitioner further contends (Pet. 21-25) that the Comprehensive Forfeiture Act of 1984 (CFA), Pub. L. No. 98-473, Tit. II, Ch. III, 98 Stat. 2040, preempts Virginia law to the extent the government might rely on such law to recover the $103,800 in cash that Covington paid petitioner. Petitioner, however, does not allege that there is a conflict in the courts of appeals on this issue, and indeed does not cite a single case for the proposition that the CFA preempts state common law remedies such as conversion. Accordingly, further review is not warranted.

In upholding the government's right to pursue state law remedies, the court of appeals relied upon this Court's recent analysis in *United States* v. *Texas*, which reiterated the long-standing principle that federal statutes are presumed to complement common law remedies, absent clear legislative intent

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[5] There is no merit to petitioner's contention (Pet. 5 & n.2, 17) that the court of appeals' resolution of the bill of particulars issue is inconsistent with *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), and similar cases from other circuits that have required an adversary hearing on whether probable cause supports a forfeiture of attorneys' fees. As we have noted, petitioner had the benefit of such a hearing. And, in any event, those cases lend no support to petitioner's contention that the Constitution precludes the use of a bill of particulars to specify assets subject to forfeiture. Indeed, the only reference in *Monsanto* to a bill of particulars is the court's observation that "where an indictment alleged that the government would seek forfeiture of all profits and property susceptible to that penalty, and a bill of particulars identified the forfeitable properties, this procedure satisfied the requirement of Fed. R. Crim. P. 7(c)(2)." *Id.* at 1196.

to the contrary. Pet. App. 11a-13a. See *English* v. *General Electric Co.*, 496 U.S. 72, 83 (1990) ("no basis for * * * contention that all state-law claims arising from conduct covered by [federal statute] are necessarily included in the pre-empted field"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 257-258 (1984) (rejecting contention that the award of punitive damages under state tort law conflicted with the remedial scheme under federal law regulating nuclear facilities). Petitioner attempts to distinguish *Texas* on the ground that a holding of preemption in that case would have weakened governmental rights, whereas a holding of preemption in the present case allegedly "would not weaken any preexisting common law right of the government to conversion," because, under petitioner's analysis, no such right exists. Pet. 25. Petitioner's argument in this regard is circular, and reduces to the assertion that underlies the third question presented by the petition, *i.e.*, that Virginia law would not recognize a conversion claim under the circumstances of this case.

3. Petitioner's final claim (Pet. 25-30) is that the government failed to satisfy one of the elements of conversion under Virginia law, *viz.*, a right to immediate possession of the property, because the government's claim as to that element was impermissibly predicated on the "relation back" doctrine of 21 U.S.C. 853(c). In asserting that claim, petitioner principally relies upon *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), a case on which petitioner placed so little stock in the courts below that it was first cited, in a petition for rehearing, only after the court of appeals ruled adversely to petitioner.

It is far from clear that *Grundy* actually decided the question framed by petitioner, since immediately after the passage quoted by petitioner (see Pet. 29), the Court declined to "inquire whether an action on the case against *Grundy & Thornburgh*, for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown," and it further noted it had merely "suggest[ed]" the probable "objections to the action, without deciding on them." *Grundy*, 7 U.S. at 354. Moreover, whereas Covington's guilt in the present case was adjudicated as a result of his guilty plea, the underlying crime in *Grundy* was "yet remaining to be proved." *Id.* at 355. The actual holding of *Grundy* is limited to the subsequent discussion that the government could not maintain a statutory cause of action under the "Act for registering and recording ships and vessels" (*id.* at 349), because such an action for value "c[ould] only be supported against the person who has taken the [statutory] oath," not against a third-party purchaser of the bankrupt's property. *Id.* at 355. Finally, there is no indication in *Grundy* that the transferees had any reason to believe that the property was subject to forfeiture, whereas in this case the courts below rejected petitioner's claim that it was an "innocent" owner of the cash it received from petitioner. The court of appeals simply held that petitioner could not convert the cash to its own purposes in those circumstances.

In any event, the decision below stands for no more than the proposition that, as a matter of state law, Virginia courts would recognize the government's right to possession under 21 U.S.C. 853(c) to the same extent that they would give effect to any other "legal

or contractual authority [that] establish[es] a right to possess * * * property." Pet. App. 13a. Nothing in *Grundy* could possibly conflict with that proposition, and the court of appeals' interpretation of Virginia law is not otherwise worthy of this Court's review. See, *e.g.*, *Ulster County Court* v. *Allen*, 442 U.S. 140, 153-154 (1979); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).[6]

There is no greater merit to petitioner's claim (Pet. 26) that the court of appeals' analysis conflicts with *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993), and *CHoPP Computer Corp.* v. *United States*, 5 F.3d 1344 (9th Cir. 1993), cert. denied, 115 S. Ct. 63 (1994). In *Buena Vista*, the Court concluded that the government cannot avail itself of the statutory "relation back" provision in the civil forfeiture statute, 21 U.S.C. 881(h), until the third-party property claimant "has had the chance to invoke and offer evidence to support the innocent owner defense under [21 U.S.C.] 881(a)(6)." *Buena Vista*, 507 U.S. at 129. That holding does not help petitioner, who was

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[6] Petitioner also contends (Pet. 24, 7 n.3) that the court of appeals' reliance on 21 U.S.C. 903 conflicts with the decisions of three other courts of appeals. See *United States* v. *Lot 5*, 23 F.3d 359 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995); *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991); *United States* v. *Stazola*, 893 F.2d 34 (3d Cir. 1990). The court of appeals, however, merely cited Section 903 to rebuff petitioner's claim that the federal forfeiture laws effectively "occupy the field to the exclusion of state law." Pet. App. 17a; *id.* at 14a. Nothing in the cases cited by petitioner shows that the court of appeals erred in citing Section 903 for that proposition. Indeed, consistent with Section 903, all three cases were resolved in favor of the government's authority to pursue its narcotics interdiction activities to the maximum extent allowable under law.

afforded a two-day evidentiary hearing on its claim that it was an innocent owner (or "bona fide purchaser") of the $103,800. See Pet. App. 130a. The government relied on the relation-back doctrine to establish one element of the tort of conversion *after* the district court determined that petitioner could not sustain its claim of innocence, and therefore obtained no intervening property right that would prevent the operation of the relation-back doctrine.

CHoPP Computer is similarly unhelpful to petitioner's cause. In that case, the Ninth Circuit interpreted California law to hold that the United States, as a judgment lienholder, was not liable to the retroactive owner of a constructive trust. The court explained that there was "no California law that suggests that CHoPP may rely upon a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final." *CHoPP Computer*, 5 F.3d at 1348. Consequently, the Ninth Circuit held, "the imposition of a constructive trust did not give CHoPP title" to the property in question "at the time of the Government's levy," and the government thereore "did not commit a conversion" at the time it levied the funds. *Id.* at 1349. After analyzing *CHoPP Computer*, the district court in this case concluded that the Ninth Circuit's reasoning "clearly reveals that the retroactive effect of a constructive trust in California law differs greatly from the retroactive effect of a forfeiture order in federal law." Pet. App. 38a n.20. Petitioner does not even attempt to rebut that conclusion. *CHoPP Computer* thus has scant relevance to criminal forfeiture under federal narcotics laws and surely does not pose a conflict with the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-356

In the Supreme Court of the United States

OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, P.C.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner, Moffitt, Zwerling & Kemler, P.C. ("MZK"), hereby replies to the government's brief in opposition ("Opp.").

1. The government's Opposition contains several material inaccuracies of fact. We correct those herein.

2. MZK's petition demonstrated the fundamental conflict between the Fourth Circuit's holding, allowing the government unilaterally to add attorney fee forfeiture to a case through use of a bill of particulars subject to no neutral review, and decisions of other Circuits, requiring a probable cause determination that a fee asset is subject to forfeiture before a criminal defendant may be prevented from using such an asset to retain counsel. The government makes no effort to reconcile that split.

3. The government's assertion that petitioner may lack standing to raise violations of the Fifth and Sixth Amendments is flatly refuted by this Court's standing analysis in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

4. MZK's petition explained that the Fourth Circuit's preemption analysis should be reviewed because it turns the rationale of *United States v. Texas*, 507 U.S. 529 (1993), on its head by subjecting third parties to a common law action that is more onerous than both the federal statutory scheme it is predicated on and the common law as it existed when that statute was enacted. The government's Opposition ignores the fact that the

government has no conversion cause of action independent of the Comprehensive Forfeiture Act of 1984 ("CFA").

5. MZK's petition showed why the Fourth Circuit's endorsement of a common law conversion action based on the federal relation-back fiction is inconsistent with the understanding of that fiction found in this Court's cases, as well as decisions of other Circuits. The government's attempt to dismiss this issue as one of state law is plainly wrong.

ARGUMENT

1.a. The government at several points misstates the record below. The most troubling such instance is the government's repeated statement that this petitioner "discouraged" its client from pleading guilty "on the ground that such a plea would place petitioner's acceptance of the fee in an unfavorable light." *See* Opp. 4, 11. There was no finding below that the law firm's "desire to protect its fee was overriding its obligation to represent its client" or that it "had placed itself in a position of square antagonism to the client's interests." *See id.* at 11.

As the record reflects, the defendant wanted the law firm to continue as his counsel, but the district court disqualified the law firm because it concluded that "no such waiver could be accepted because a potential or actual conflict exists that cannot be waived." Pet. App. 166a. The court did identify one of the disqualifying conflicts as the "statements allegedly made by the defendant." Tr., Hearing, Aug. 12, 1992, at 5-6. But the court explained that the disqualification was "not a conclusion that I reach with any imputation of any wrongdoing on the part of the law firm. That's not a matter before the Court, and I don't address that." *Id.* at 8. Noting that "some of the activities of the government . . . led to this," *id.*, the court also stated that "another important [conflict] grows out of the government's intention to use evidence concerning the legal fee paid by this defendant to the law firm." *Id.* at 5-6.[1/]

[1/] Not only was there no finding of wrongdoing by the district court, but the allegation was not made in open court and was not subject to cross-examination. In fact, the district court refused to allow petitioner to cross-examine the defendant on this allegation at the forfeiture hearing because the court ruled that it was not relevant to the forfeiture issues. Tr., Hearing, July 8, 1993, at 68-70. Nor was the allegation uncontradicted: the MZK partner

The alleged conversation, in any event, bears no arguable relevance to the issues raised by this petition. It took place almost a year after the firm's acceptance of its fee and allegedly involved a lawyer not present when the fee was accepted. Indeed, the only thing demonstrated by the disqualification is the inevitability of the conflict engendered by the government's use of a bill of particulars to add the law firm's fee to the forfeiture count of the superseding indictment.

b. Also misstated are the government's repeated suggestions that MZK accepted its fee *knowing* it was subject to forfeiture.[2/] There was no such finding below. The district court found:

> There wasn't any wrongdoing [by MZK]. These were not lawyers who deliberately did something knowing they were doing something wrong. That isn't this case. These are distinguished lawyers of this bar. This is an unclear area of the law, and while they didn't win this issue, they committed absolutely no wrongdoing.

Tr., Hearing, March 18, 1994, at 20. The court further found that, "[a]lthough the law firm could not prove by a preponderance that it qualified for § 853's bona fide purchaser protection, *there are no facts indicating [MZK] had actual notice or knowledge that the $103,800 was subject to forfeiture.*" Pet. App. 83a n.40 (emphasis added). The government ignores this in its effort to emphasize that MZK received a large sum of cash from a later-convicted drug dealer. This was a "mixed asset" case, however, which means that the defendant had assets that were not subject to forfeiture. Moreover, the defendant 1) operated two businesses (including a towing business that dealt in cash); 2) had a history of possessing large amounts of apparently untainted cash from before the time he started dealing drugs; and 3) told the law firm partners that for personal reasons he pre-

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allegedly involved in the conversation submitted a sworn affidavit directly controverting the allegation.

[2/] The government quotes the Fourth Circuit as stating that the law firm "engag[ed] in *** a wink and nod ritual." Opp. 3. The court actually said that it thought the meetings between the law firm and its client "create the impression" of such a ritual. Pet. App. 9a. This is a subtle difference, but an important one, given the district court's findings that MZK committed no wrongdoing and that there was no evidence MZK knew the fee was tainted.

ferred to retain his income as cash. The courts below concluded that these lawyers did not carry the burden of proving that their subjective belief was objectively reasonable. But MZK committed no wrongdoing; rather, the firm for nearly a year vigorously and honorably defended its client.

2.a. The government does not directly rebut the constitutional arguments raised in MZK's petition. The constitutional proposition is straightforward: it is unconstitutional to prevent a criminal defendant from using property not yet adjudged forfeitable to retain counsel of his or her choice absent a neutral determination by a court or grand jury that there is probable cause to believe such property is subject to forfeiture. *Caplin* and *United States v. Monsanto*, 491 U.S. 600 (1989), are premised on such protection. *See, e.g., id.* at 615-16. Instead, the government, citing *Libretti v. United States*, -- U.S. --, 116 S. Ct. 356, 363 (1995), argues that no legal weight should be given this Court's statement in *Caplin* that "any assets which the Government wishes to have forfeited must be specified in the indictment." 491 U.S. at 632 n.10. There is nothing, however, in *Libretti* that is inconsistent with the acknowledgment in *Caplin* and *Monsanto* of some limited constitutional constraint against pretrial deprivation of a fee asset.

Other Courts of Appeals recognize the constitutional necessity of providing neutral probable cause scrutiny before depriving a criminal defendant of the right to use his or her property to retain counsel.[3/] Indeed, those courts go further and provide that a grand jury's probable cause determination can be reviewed at an adversarial hearing before a defendant can be prevented from using property not yet adjudged forfeitable to retain counsel. The Fourth Circuit's holding is fundamentally at odds with these precedents. The government fails to explain how these decisions can be reconciled.

b. Ignoring its earlier representations to the district court that the fee asset was not identified in the indictment, the government here contends that the fee asset was properly "pinpointed" through the use of a bill of particulars. The govern-

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3/ *See, e.g., United States v. Michelle's Lounge*, 39 F.3d 684, 691, 695 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), *cert. denied*, 502 U.S. 943 (1991); *see also* Pet. 5 n.2.

ment's two arguments in support of its claim that the fee asset was "encompassed" by the forfeiture language of the indictments are not supported by the record.

The government first contends that the fee asset is encompassed by a general catchall provision in the indictment. This provision does not "encompass" the fee asset in any meaningful way. It does not constitute a probable cause determination that *all* of the defendant's property is subject to forfeiture or that *any* specific property is subject to forfeiture; and it certainly does not entail a probable cause determination that *the* property the defendant used or intends to use to retain counsel is subject to forfeiture. Rather, it is a tautology which simply restates the necessary fact that all forfeitable property is subject to forfeiture. *See* Pet. 18. In a mixed asset case such as this, where the government did not seize all of the defendant's property, and even returned to him some property, the inclusion of such a catchall provision provides neither neutral scrutiny justifying the pretrial deprivation of the defendant's right to use his property to retain counsel nor notice to third parties.

The second justification put forth by the government is a post-hoc invention that demonstrates the government's failure to take seriously the need for some neutral scrutiny of the nexus between the property and the criminal activity. The government claims that the fee asset was included in the indictments as item 5, "[a]ny and all interest of [the defendant] in $168,000 in United States currency." *See* Pet. App. 181a, 183a. This, however, was not the government's original position.

First, at a March 13, 1992 hearing, the government told the court that the fee asset was *not* the subject of any count in the indictment; it was *not* seeking criminal forfeiture of the fee; and it had just learned details of the fee and therefore could not have identified the fee asset to the grand jury. Pet. App. 186a- 87a. *Next*, on May 29, 1992, after the defendant and MZK moved to dissolve the restraining order because the fee was not part of the indictment, the government contradicted its prior statements to the court and argued that the fee actually was part of the catchall provision of the forfeiture count. *Finally*, on June 1, 1993, the government argued for the first time that the fee was in the indictment all along as part of item 5.

This most recent argument also is inconsistent with the way the fee is described in the bill of particulars -- as an *additional* asset to be *added* to the forfeiture count. The fee asset is listed as item 13 to the list of forfeitable assets that still listed the $168,000 as item 5. Moreover, it is inconsistent with the way the $168,000 was identified to the grand jury. The $168,000 is one of several cash items in the forfeiture count, *see* Pet. App. 181a, 183a, and consisted of assets other than the fee asset, specifically money spent by the defendant on alimony, entertainment, jewelry, and cars. *See id.* 189a-90a.

The government's inability to consistently identify where in the indictment the fee asset is identified belies any argument that the grand jury determined that there was probable cause to believe the fee was forfeitable. The plain fact is that the government's March 1992 statement to the court that the fee asset was not identified in the indictment was correct. The post-hoc rationalizations make a mockery of the notion of neutral scrutiny and cannot be reconciled with *Caplin*'s requirement that such an asset be specified in the indictment.

c. The government's assertion that "even assuming . . . that the cash transferred to petitioner was not encompassed within the forfeiture allegations of the indictment, petitioner had the benefit of an adversary hearing on the question of forfeitability in the district court," *see* Opp. 13, completely misses the point. The forfeiture hearing, which by statute cannot take place until after conviction, *see* 21 U.S.C. § 853(n)(1), was held on July 7 and 8, 1993, and the court's decision denying the petition was issued February 3, 1994 -- long after the indictment, the disqualification, the scheduled trial date, and the guilty plea. A post-conviction hearing provides no protection whatsoever against an erroneous pretrial deprivation of a criminal defendant's right to use his property to retain counsel and it does nothing to prevent the government from using a bill of particulars tactically to inject a disqualifying conflict into a case.[4/]

[4/] The contention that the government used fee forfeiture tactically here is not idle speculation. Two different district court judges observed that the government's conduct appeared calculated to drive the law firm out of the case. Judge Bryan stated

> It concerns me. And the perception, regardless of actual motives, the perception that arises from the timing of it is damning, it seems

d. Notwithstanding the government's arguments to the contrary, the prejudice caused by the use of the bill of particulars is manifest. The law firm was disqualified after nearly a year of legal services. Those services were by provided by MZK as a bona fide purchaser for value, Pet. App. 139a, and the fee expended in "in the ordinary course of business" well before the bill of particulars was filed. *Id.* at 24a. Had the indictments specified the fee asset, the firm at that time could have chosen whether to withdraw, to represent the defendant *pro bono*, or to seek alternative sources of payment before dedicating its time and resources to this matter.

The failure to specify the fee in the indictment also resulted in the fee asset, and counsel, becoming an issue in plea negotiations. The government made the defendant's cooperation in pursuing forfeiture from his former lawyers part of the plea bargain. His sentence was reduced in exchange for his "unstinting efforts" against his former counsel, his consent to forfeiture of the fee (after he had paid the fee to the firm), and his testimony at the forfeiture hearing that the fee assets were drug proceeds. He thus gained both the benefit of the MZK's legal services and a sentence reduction (from 262 to 60 months), rather than the additional punishment that is the rationale for criminal forfeiture. There are sensible alternatives to this unseemly spectacle. The government can specifically identify the fee asset in the indictment. If it cannot, or chooses not to do so, it retains the remedy of civil forfeiture.

3. The government's suggestion that the law firm may lack *jus tertii* standing to challenge the constitutionality of the use of the bill of particulars is difficult to fathom. Contrary to the government's assertion, the petition does not assert the defendant's rights under the Grand Jury Clause of the Fifth Amendment. The petition expressly asserts violations of the due process clause of the Fifth Amendment and the right to counsel

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> to me, to the United States Attorneys' Office. The idea that you threaten a lawyer with prosecution a few weeks before trial in which he is involved, it looks like, whatever you meant, that you are trying to drive that lawyer out of the case.

Tr., Hearing, March 13, 1992, at 47-48. Similarly, Judge Ellis observed that "[r]easonable people" could view the government's actions as an attempt to drive MZK out of this case. Pet. App. 211a.

clause of the Sixth Amendment, precisely the rights at issue in *Monsanto*, *Caplin*, and the decisions cited in n.3.

MZK stands in precisely the same position as did the petitioner in *Caplin* and, as in *Caplin*, raises claims cognizable regardless of the defendant's guilty plea and consent to the forfeiture order. *See* 491 U.S. at 621. *First*, the law firm suffered an injury-in-fact adequate to satisfy Article III's case-or-controversy requirement -- its stake in its fee. *Id.* at 624 n.3. *Second*, the law firm seeks to defend the attorney-client relationship, a relationship of "special consequence." *Id.* *Third*, the procedure employed by the government will materially impair the ability of similarly-situated third parties to exercise their constitutional rights. *Id.* The government's assertion that this case is different from *Caplin* because MZK "placed itself in a position of square antagonism to the client's interests," *see* Opp. 11, is both unfounded and unpersuasive. As discussed *supra*, there is no proper basis for that assertion. And, more importantly, as the district court recognized, the disqualification issue arose, at least in part, because *the government* added the fee to the case. Indeed, it is this disruption of the attorney-client relationship between the defendant and the law firm -- relied on by the government to argue against standing -- that forms the basis of this challenge.

4. The government blithely argues that the law firm's preemption claim does not merit review because MZK's "argument in this regard is circular, and reduces to the assertion that underlies the third question presented by the petition, *i.e.*, that Virginia law would not recognize a conversion claim under the circumstances of this case." Opp. 16. This argument ignores the hybrid nature of the conversion claim pursued by the government and misreads the substance of MZK's petition.

No conversion claim could have been asserted by the government under the facts of this case until the CFA incorporated the relation-back fiction into the criminal forfeiture framework. It simply cannot be contested that, without the relation-back fiction, the government would, prior to entry of the forfeiture order, hold no rights in property subsequently forfeited and thus *could not* under any state's law bring a conversion action to recover that property. Thus, no "longstanding" right to sue for

conversion *in this context* predated the passage of the CFA. Rather, the CFA itself created the potential for the hybrid action -- state law conversion plus statutory relation-back -- pursued here by the government. That hybrid, more expansive than either common law conversion or statutory criminal forfeiture, potentially subjects every third-party transferee to a suit by the government for damages -- despite the fact that the CFA expressly limits the power of the government to recover damages from third parties.

The Fourth Circuit's erroneous application of *Texas* disregarded the preemption standards set forth by this Court in *English v. General Elec. Co.*, 496 U.S. 72 (1990), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The Fourth Circuit likewise relied upon an interpretation of 21 U.S.C. § 903 that conflicts with precedents of the Third, Fifth, and Eleventh Circuits. *See* Pet. at 24 & n.3. Review to resolve the conflict between the federal statutory scheme and the state law claim based upon that scheme is therefore appropriate.

5. The Fourth Circuit's holding that a state law tort claim can be founded retroactively on a federal forfeiture order works a massive rewriting of federal forfeiture law, particularly with respect to third-party transferees, but the government nonetheless dismisses the Fourth Circuit's decision as nothing more than an interpretation of state law. Virginia's law of conversion is not novel: a necessary predicate to a common law conversion claim is the plaintiff's right to immediate possession of the property at the time the property is obtained or used by the defendant. The operative question in this case is purely one of federal law -- does the federal relation-back fiction codified in the CFA retroactively create a right to immediate possession. In *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993), and *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), this Court made clear that the relation-back fiction does not vest all rights of ownership in the government at the moment of the illegal act. Until the forfeiture order enters, the government does not own the property. Upon entry of the order, title then relates back to ensure that the government receives title unencumbered from the time of the illegal act. The idea, however, that the relation-back fiction can create retroactively *in personam* tort liability is utterly novel and is incon-

sistent with the understanding of relation-back set forth in *Buena Vista* and *Grundy*, as well as decisions such as *Counihan v. Allstate Ins. Co.*, 25 F.3d 109 (2d Cir. 1994).

The government's further assertion that the two-day evidentiary hearing on the law firm's § 853(n) petition somehow justifies the imposition of tort liability simply makes no sense. That hearing established only that the law firm could not carry the burden of showing it was reasonably without cause to believe the fee asset was subject to forfeiture, nothing more. The law firm's failure to prevail in its § 853(n) petition in no way demonstrates that *the government* has the requisite possessory interest to state a conversion claim.

In its effort to distinguish this case from those cited in the petition, like *CHoPP Computer Corp. v. United States*, 5 F.3d 1344 (9th Cir. 1993), *cert. denied*, -- U.S. --, 115 S. Ct. 63 (1994), the government assumes the existence of a never before recognized cause of action, a hybrid "criminal-forfeiture-conversion" claim. This new cause of action is indeed convenient for the government for it allows it to have it both ways. Normal notions of tort liability do not apply because such notions have "scant relevance to criminal forfeiture under federal narcotics laws." *See* Opp. 18. At the same time, the express limitations of federal criminal forfeiture law (such as Congress's deliberate omission of a substitute asset remedy against third parties) can be disregarded because this is nothing more than a state law conversion action. The government's theory is illogical and unprecedented; it creates a strict liability tort that can be used against third parties that goes far beyond any remedy created by the criminal forfeiture statute on which it is based; it is inconsistent with this Court's precedent and that of other Circuits; and, accordingly, it should be reviewed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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